82-1032
NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HERMAN J. DOUCET

Petitioner

versus

DIAMOND M DRILLING COMPANY

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Did the United States Court of Appeals erroneously decide an important question of federal law which has not been, but should be settled by this Court, when it reversed a $540,000 jury verdict for the plaintiff in a negligence action brought under 33 U.S.C.A. §905(b) by applying the Court's own standard of review for jury verdicts in non-maritime cases arising under state statutes or state common law, instead of the standard of review for jury verdicts in cases arising under federal maritime statutes?

(2) Did the United States Court of Appeals decision violate the decisions of this Court setting forth the proper scope of appellate review of jury verdicts under the Seventh Amendment to the United States Constitution?

(3) Did the United States Court of Appeals require Herman Doucet to assume the risk of a hazard created by the vessel owner's employees in violation of this Court's declaration that assumption of risk is not a defense to a negligence suit brought under 33 U.S.C.A. §905(b)?

(4) Did the Court of Appeals continue to apply its own restrictive standard of shipowner negligence, fashioned before this Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, instead of the broader standard of shipowner negligence promulgated by this Court in *Scindia*?

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Herman Doucet, plaintiff in the captioned cause, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 23, 1982, (original decision) and on September 22, 1982, (per curiam denial of rehearing and of rehearing en banc).

CITATIONS TO OPINIONS BELOW

The judgment of the District Court on the jury verdict is unreported and is reproduced in the supplement at Appendix 4, Brief A-24. The court minutes showing the District Court's denial of defendant's motions for directed verdict, judgment n.o.v., and new trial are reproduced at Appendix 3, Brief page A-23. The opinion of the United States Court

of Appeals for the Fifth Circuit dated August 23, 1982, (Circuit Judges Coleman, Politz and Garwood), is reproduced in the supplement beginning at Appendix 2, Brief page A-3, and is reported in 683 F.2d 886. The opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing, dated September 22, 1982, is reproduced in the supplement beginning at Appendix 1, Brief page A-1.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing in the cause was entered on September 22, 1982. This petition of certiorari was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254(1), 62 Stat. 928.

STATEMENT OF THE CASE

Herman J. Doucet sued Diamond M Drilling Company and Chevron U.S.A., Inc., to recover damages for permanently disabling personal injuries he sustained while working as a crew pusher aboard the Diamond M Epoch, a submersible drilling barge owned and operated by Diamond M Drilling Company, which was engaged in oil and gas exploration in the Gulf of Mexico. Doucet sued Diamond M under §905(b) of the Longshoremen's and Harbor Worker's Act (L.H.W.C.A.)[1] and Chevron for negligence under the general maritime law.

1/ 33 U.S.C.A. §905(b), hereinafter called merely §905(b), allows a maritime worker to sue for injuries "caused by the negligence of a vessel."

After a three (3) day trial, the jury found Diamond M guilty of negligence and absolved Chevron. The jury awarded Doucet damages in the amount of $600,000, but found him to be 10% at fault, thus reducing the award to $540,000, less the amount of $65,213.64 claimed by the workmen's compensation intervenor, American Home Assurance Company for medical expenses and compensation previously paid to Doucet.[2]

At the close of the plaintiff's case, Diamond M's motion for a directed verdict was denied. Following the trial, the Trial Judge denied Diamond M's motions for directed verdict; or alternatively, for Judgment Non Obstante Verdicts, or for Remittitur or for a new trial.

Diamond M appealed. On August 23, 1982, the Court of Appeals reversed the jury's finding of negligence and the trial judge's failure to grant Diamond M a directed verdict, holding that a reasonable jury could not have found substantial evidence that Diamond M was negligent. Plaintiff's petition for rehearing and suggestion for rehearing en banc were denied on September 22, 1982.

FACTS

A. ***Roles of the Parties***:

2/ Thus all parties to the proceeding below were: (1) Herman J. Doucet (plaintiff); (2) Diamond M Drilling Company (defendant); (3) Chevron U.S.A., Inc. (defendant); and (4) American Home Assurance Company (intervenor). Chevron was not a party to any appeal.

Chevron contracted with Diamond M to drill oil and gas wells in the Gulf of Mexico, off the Louisiana coast. Diamond M contracted to provide a submersible drilling barge, the "Epoch", two drilling crews and roustabout crews. Chevron contracted with Doucet's employer, Offshore Casing Crews, Inc., to install or "run" casing on board the Epoch. "Casing" is steel pipe placed in an oil or gas well as drilling progresses to prevent the wall of the hole from caving in during drilling and to provide a means of extracting petroleum if the well is productive. Running casing is normally done by casing company employees with the cooperation of drilling company employees. The casing itself *was supplied by the owner* of the Offshore oil well, Chevron.

The driller is Diamond M's employee directly in charge of the drilling rig and crew. His main duty is operation of the drilling and hoisting machinery. From his position at a control console on the drilling rig floor, he manipulates the levers, switches, and brakes that control the machinery which raises and lowers pipes. His primary role in assisting the casing operation is to raise or lower the casing pipe to a proper working height. From his control panel the driller has a full view of all casing being raised from the pipe racks to the drill floor.

On April 21, 1977, Doucet, together with four other members of an Offshore Casing crew, Dale Briscoe, Glen Bourgeois, Terry Meche and Emory Richard, boarded the Epoch to run 4,000 feet of thirteen and three-eights (13 3/8") inch diameter casing. Chevron also ordered *five thirteen and three-eights inch clamp-on rubber protectors* to cover the threads on the male end of the casing so that

the threads would not be damaged while the casing was being moved about on the drilling barge.

The use of rubber protectors or "quickie" protectors in a casing operation is a simple process. The roustabouts remove a metal thread protector from the casing while the joint of casing is laying horizontally on the pipe rack, located one deck below the drill floor. Then the roustabouts replace the metal protector with a rubber protector and send the joint of casing up to the drill floor to the casing crew to be run into the well hole. On the drill floor, a casing crew member simply pulls on a latch on the rubber protector which easily releases the protector from the joint of casing. Then the casing crew sends the rubber protector back down to the pipe rack on a cable trolley line, so that it may be used on another joint of casing.

B. ***What the Roustabouts Failed to Do***:

It was the duty of the Diamond M roustabouts to remove the metal protectors from the casing while it was on the pipe rack and to replace the metal protectors with rubber protectors. All the evidence at trial showed that the Diamond M roustabouts failed to remove a cross-threaded protector from one joint of casing and simply sent it up to the drill floor for Doucet and his crew to remove it. As stated by the Court of Appeals in its opinion, "We think the jury could reasonably infer from the evidence that the roustabouts found it either difficult or impossible to remove the metal protector, so they simply sent it to the drilling floor where the casing crew would have to deal with it . . ." 683 F.2d at 890.

Therefore, Doucet had to stop running casing and attempt to remove a cross-threaded protector from the threads of a

2,000 pound joint of casing (which was 40 feet long and 13 3/8 inches in diameter) while the pipe was swinging suspended from a cable hung from the top of the derrick of the Epoch. Doucet had to wrestle with the free-swinging casing because the Diamond M roustabouts had breached their admitted duty to remove the metal protector and replace it with an easily removable rubber protector while the casing was lying inert on the pipe rack - a much less hazardous operation than manhandling a one ton swinging object. On the pipe racks, several roustabouts could have combined efforts to remove the cross-threaded protector or a welder could have cut it off.

C. ***What the Driller Failed to Do***:

When the joint of casing came up to the rig floor with the metal protector still in place, Doucet noticed one of his crew members having difficulty removing the metal protector by hand. Doucet got a 36 inch stillson wrench to remove the metal protector. Doucet saw that the joint of casing was too low to allow him to use the wrench while in a standing position. Thus Doucet asked the Diamond M driller, who was ten feet away and looking straight at Doucet, to pick up on the pipe. Doucet said his request was ignored and that he had to bend over awkwardly to jerk on the protector while it was only two or three feet off the floor, thereby rupturing a disk in his back.

Emory Richard, a member of the casing crew, testified that he heard Doucet ask the driller to raise the joint of casing and that the Diamond M driller ignored the request. Richard said Doucet was approximately seven (7) or eight (8) feet from the driller when the request was made. The

driller was four (4) or five (5) feet from Richard. *Richard testified that the driller should have heard Doucet's request and that the driller had failed to respond.*

Billy Buchans, the Diamond M driller, professed to remember nothing about the incident. Both Buchans and Joe Hawkes, Diamond M's safety supervisor and a former driller, testified that in a casing operation, the driller is watching the pipe and must stop it at a proper height so the person working on the casing will not have to bend over too far to remove the thread protectors.

Paul Montgomery, a petroleum engineer, testified that when rubber protectors are available, the preferred operational procedure is to remove the metal protector on the pipe rack because more time and more people are then available to deal with a problem protector than on the drill floor.

Mr. Robert Owen, a safety engineer, testified that the preferred method of applying force upon a wrench would be downward and, therefore, it would have been safer to remove the protector from a cylindrical object, such as the casing, while the object was laying horizontally on the pipe rack, rather than while the object was suspended from a cable. Mr. Owen also said that it was safer to pull upon the wrench from chest level, in a standing position, rather than from a bent position.

The Court of Appeals held that although the Diamond M roustabouts had sent the casing up to the drill floor where the casing crew would have to deal with the cross-threaded protector while the casing was hanging from a cable, Doucet had not been exposed to an unreasonable

hazard of personal injury. The Court of Appeals did not comment on the roustabouts' failure to leave the bad joint on the pipe racks or on their failure to warn Doucet that a bad joint was coming.

Additionally, the Court of Appeals held that the evidence was insufficient to find the Diamond M driller negligent because although the jury could reasonably have believed that Doucet had requested that Buchans raise the pipe, there was no evidence showing that Buchans had heard Doucet's request. Of course, the record is utterly devoid of any evidence that Buchans did not hear the request! Buchans himself did not say he did not hear but only that he did not remember the incident at all. Nor did the Court specify how one might go about proving that someone heard something other than introducing proof that someone else standing in the same place (Richard) heard it! Finally, the Court of Appeals failed to comment on how it absolved the driller from negligence in failing to properly position the casing, which was the sole *raison d'etre* for his presence on the drill floor.

JURISDICTION OF THE COURT BELOW

Jurisdiction of this action is grounded upon 43 U.S.C. §1333, the Outer Continental Shelf Lands Act, which extends jurisdiction to accidents occuring on the Outer Continental Shelf involving maritime workers covered by 33 U.S.C. §905(b), and upon 28 U.S.C. §1391(a), which establishes the diversity jurisdiction of the federal courts.

REASONS FOR GRANTING CERTIORARI

I.

THE COURT OF APPEALS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, WHEN IT APPLIED ITS OWN STANDARD OF JURY VERDICT REVIEW FOR NON-MARITIME CASES ARISING UNDER THE COMMON LAW AND STATE STATUTES TO A JURY VERDICT IN A NEGLIGENCE ACTION CREATED BY FEDERAL MARITIME STATUTE [33 U.S.C. §905(b)].

The Court of Appeals reversed the jury verdict for Herman Doucet by finding that "reasonable jurors [could not] differ over whether substantial evidence supported an inference," 683 F.2d at 894, that Diamond M was negligent, and that the Trial Court mistakenly denied defendant's motion for a directed verdict. In so doing the court admittedly "analyzed and reanalyzed the record," 683 F.2d at 890, which might fairly be characterized as "weighing and reweighing" the evidence.

The Court of Appeals admitted that, "our task has not been made any easier by the fact that Diamond M was so confident of its position that it offered *no testimony* of its own." 683 F.2d at 890. Undaunted, the Court, on a key point, undertook to determine whether: "In this mass of *inconsistent*, sometimes contradictory, testimony, . . . could a reasonably minded jury have found by a preponderance of the evidence that the driller, Buchans, *heard*

and *ignored* the 'hollered' request to raise the pipe a little higher?" 683 F.2d 886. Implicit in the question is the premise that an affirmative answer would result in affirmance of the jury verdict.

The Court went on to say that: "The jury had a right to believe Doucet's testimony that he 'hollered' at Buchans to raise the pipe. He said Buchans was looking at him, but he took no action. *Buchans could have heard Doucet.* Did he, in fact, do so? A close examination of the record shows that on this issue the jury was left to rely on speculation and conjecture." 683 F.2d at 886.

Even if the jury had to speculate, *Lavender v. Kurn*, 327 U.S. 645, 653, 66 S.Ct. 740, 90 L.Ed. 916, 923 (1946), long ago stated: "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute . . . a measure of speculation and conjecture is received on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.*"

Under *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 167, 101 S.Ct. 1614 (1981), 68 L.Ed.2d 1, the onus was not on Doucet to prove that *Buchans* heard the request but only that he "should have" heard it in the exercise of ordinary care. Both Buchans and Diamond M's safety supervisor, Hawkes, testified that the sole duty of Buchans at the time was to position the pipe properly for Doucet, whether or not he was asked to do so. Indeed, the Court of Appeals characterized Buchans as "Diamond

M's driller in charge of the pipe lift." 683 F.2d 892. Buchans did not deny hearing the request. He merely took the standard way out of testifying adversely to his current employer's interest by testifying that he "did not remember."

Emory Richard, who was "*five or six feet*" away from Buchans and Doucet testified positively that he heard Doucet's request. 683 F.2d 893.

Nonetheless, the Court of Appeals found "no substantial evidence" to support the jury verdict, reversed the jury and the trial court, citing as its authority the Fifth Circuit's own standard of review for motions for directed verdict or judgment n.o.v. formulated in *Boeing Company v. Shipman*, 411 F.2d 365, 374-375 (5th Cir. 1969) (en banc). 683 F.2d at 889, instead of the *Lavender v. Kurn*, *supra*, line of Supreme Court cases which would not have permitted reversal of the *Doucet* verdict because there was obviously not an "absence of probative facts" to support the jury's verdict. This was egregious error. This Court has not previously defined the standard of review for jury verdicts in negligence actions under §905(b), an important question of federal law, which should be settled.

A. *Boeing Was Decided Prior to Passage of §905(b) and Announced A Rule Explicitly Tailored For Federal Cases Arising Under Common Law or State Law-Not For Negligence Cases Based on Federal Statute.*

Section 905(b) was added to the LHWCA in 1972. *Boeing* was a 1969 Fifth Circuit Decision which, *a fortiori*, could not have been rendered with application to §905(b) in mind.

Boeing involved an Alabama diversity personal injury suit arising under the common law and Alabama statute. The rule of review enunciated there was explicitly fashioned for "non-FELA federal cases *which are not based on statute.*" *Boeing, supra,* 411 F.2d at 373. *Doucet's* action arose under a federal statute, therefore, the *Boeing* rule should not have been applied to it. Instead, language in many decisions of this Court suggests that the standard of review for jury verdicts arising under §905(b) should restrict the Courts of Appeals from tampering with jury verdicts except in those cases where there are no probative facts to support the verdict - a standard under which the *Doucet* verdict could not have been reversed.

B. *Maritime Workers Are Entitled to a Maritime Standard of Jury Review Rather Than a Common Law Negligence Standard.*

1. *Casing Crew Workers Are Maritime Workers.*

The Fifth Circuit has held that specialty workers who are injured in the offshore oilfields are not seamen but are covered under the LHWCA because they satisfy both the situs and status tests for coverage under 33 U.S.C.A. §903(2). The *situs* test is met because the injury occurs on navigable waters of the United States, *Pippen v. Shell Oil Co.*, 661 F.2d 378, (5th Cir. 1981), and because the Outer Continental Shelf Lands Act (OCSLA) provides that "the term 'United States' when used in a geographical sense includes the Outer Continental Shelf and artificial islands and fixed structures thereon." 43 U.S.C.A. §1333(b)(3); *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1348 (5th Cir. 1980). The status test is met because the specialty worker's job has a "significant relationship to traditional

maritime activity." *Pippen v. Shell Oil Co., supra,* 661 F.2d at 383; *P. C. Pfeiffer Co. v. Ford,* 444 U.S. 69, 100 S. Ct. 328, 335, 62 L.Ed.2d 225 (1979).

Without protracted analysis the Fifth Circuit in *Guidry v. Continental Oil Co.*, 640 F.2d 523 (5th Cir. 1981) assumed that a casing crew worker, such as Herman Doucet, was a maritime worker covered by §905(b). *Guidry* noted that the OCSLA, 43 U.S.C. §1333(b)(1) extended coverage of the LHWCA to injuries or death to employees resulting from exploration for natural resources on the Outer Continental Shelf.

2. *Once A Trial Court has Properly Instructed the Jury on the Standard of Negligence to be Applied in a §905(b) Case, the Jury's Verdict is Entitled to the Same Weight As a Jury's Verdict in the Other Two Species of Negligence Actions Created by Congress: The Jones Act and The FELA.*

Casing crew workers or other litigants under §905(b) are deemed to be maritime workers in order to bring their negligence suits under the aegis of a federal statute, rather than general maritime tort law. Thus they should be entitled to have jury verdicts rendered in their favor reviewed under a federal maritime statute appellate review standard not the *Boeing* standard of common law negligence appellate review. The Chief Judge of the Fifth Circuit recognized the correctness of this analysis in *Chiasson v. Rogers Terminal and Shipping Corp.*, 679 F.2d 410, 412 (5th Cir. 1982) where the Court affirmed a jury verdict for a longshoreman, observing:

> "The jury, having a chance to observe the demeanor of the witnesses and to test their credibility, concluded that Rogers was negligent. *The record provides support for the*

> *jury's finding*, which we are neither inclined nor permitted to disturb on appeal. *Sanford Bros. Boats Co. v. Vidrine*, 412 F.2d 958, 963 (5th Cir. 1968), *citing Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 76 S. Ct. 608, 100 L.Ed.2d 668 (1956)."

Both the *Vidrine* and *Schulz* cases are Jones Act cases. Thus, Judge Brown recognized in *Chiasson* the validity of Herman Doucet's contention. The standard of negligence *is* different in §905(b) cases and Jones Act cases (the *Scindia* standard of "reasonable care under the circumstances" for §905(b) versus "any negligence no matter how slight" for Jones Act and FELA). But once the jury has been properly instructed as to the standard of negligence in a §905(b) case, there is no logical reason why the jury's verdict should be accorded any less weight on appeal than a jury verdict in the other two species of negligence actions created by federal statute where a litigant may elect to try his case to a jury: the FELA and the Jones Act.

To bolster this argument we may consider these similarities:

(a) The FELA allows a railroad worker recovery for "injury or death resulting in whole or in part from the *negligence*" of railroads. 45 U.S.C. §51. Comparative negligence not contributory negligence applies. 45 U.S.C. §53.

(b) The Jones Act allows a seaman recovery for the *negligence* of his employer as defined in the FELA. 46 U.S.C. §688. Comparative negligence applies.

(c) Section 905(b) allows a maritime worker recovery for injury "caused by the negligence of a vessel." Comparative negligence applies. *Edmonds v. Compagnie Generale Transatl.*, 443 U.S. 256, 258, 61 L.Ed.2d 521, 526, 99 S. Ct. 2753 (1979).

C. *The Fifth Circuit is in Conflict.*

Diamond M has acknowledged that the Trial Judge correctly instructed the *Doucet* jury even though he did so prior to this Court's *Scindia* decision. Whether it was prescience or luck, the Trial Court instructed the jury that the proper standard of care in this case alleging operational negligence was one of "due care under the circumstances." Diamond M has not complained on appeal about jury instruction given to the jury. *Ergo*, we are entitled to assume the *Doucet* jury was properly instructed.

Judge Brown in *Chiasson* tacitly recognized that a properly instructed jury's verdict in a §905(b) case is entitled to equal dignity on appeal with a Jones Act verdict. In so doing he is in accord with decisions in other circuits. [3] Unfortunately, there appears to be a conflict on this matter both *within* the Fifth Circuit, as well as *between* the Fifth Circuit (other than Judge Brown in *Chiasson*) and other federal courts of appeals. A table of all *Pre-Scindia* and *Post-Scindia* decisions by the Fifth Circuit is appended to this application for ready reference. (Appendices 6 and 7).

There are two §905(b) cases in which the Fifth Circuit affirmed directed verdicts for defendants without stating what standard of review it was applying. [4] In the other six

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3/ See, e. g., *Johnson v. Ats Ivarans Rederi*, 613 F.2d 334, 351 (1st Cir. 1980) relying on *Rios v. Empresa Lineas Martimas Argentinas*, 575 F.2d 986, 990 (1st Cir. 1978) which cites *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479, 64 S. Ct. 232, 88 L.Ed.2d 239 (1943) which is an FELA case.

4/ *Hess v. Upper Mississippi Towing Corp.*, 559 F.2d 1030 (5th Cir. 1977); *Guidry v. Continental Oil Co.*, 640 F.2d 523 (5th Cir. 1981).

reported §905(b) cases emanating from the Fifth Circuit [5] where the standard of review for jury verdicts was at issue, the Circuit Court panels involved uniformly applied the common law/state negligence statute standard of *Boeing* to jury verdicts under a federal statute, thereby ignoring the limitations expressed by *Boeing* itself which only purports to fashion a rule for "federal cases which are not based on statute." *Boeing Company v. Shipman, supra*, 411 F.2d at 373. Thus, Judge Brown's analysis in *Chiasson* stands alone among nine reported cases as a correct statement of the proper standard of appellate review of jury verdicts in §905(b) cases.

Rule 17 of the United States Supreme Court says writs of certiorari are appropriate: "(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter;" or "(b) When a . . . federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court. . . ." Thus review of the *Doucet* decision by this Court is in order.

D. The Same Policy Reasons Which Have Motivated This Court to Discourage Appellate Tampering With Jury Verdicts in Jones Act and FELA Cases Apply in This Case: Furtherance of Safety of Workers in a Dangerous Occupation and Protection of a Federal Statutory Policy Enshrined in Remedial Legislation.

5/ *Samuels v. Empresa Lineas Martimas Argentinas*, 573 F.2d 884, 885 (5th Cir. 1978); *Stockstill v. Gypsum Corp.*, 607 F.2d 1112, 1114 (5th Cir. 1979); *McCormack v. Noble Drilling Co. of California*, 608 F.2d 169 (5th Cir. 1979); *Hebron v. Union Oil Co. of California*, 634 F.2d 245, 247 (5th Cir. 1981); and *Doucet v. Diamond M Drilling Co.*, 683 F.2d 886, 889 (5th Cir. 1982).

From 1943 to 1949, this Court granted writs in 20 FELA cases and in "16 of these cases the lower court was reversed for setting aside a jury verdict for an employee or taking the case from the jury." *Wilkerson v. McCarthy*, 336 U.S. 53, 70, 69 S.Ct. 413, 93 L.Ed. 497, 509 (1949). This Court was sending the lower courts a clear message which it summarized as follows:

> "The Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations. . . . That purpose was not given a friendly reception in the courts. In the first place, a great maze of restrictive interpretations were engrafted on the Act * * *. In the second place, doubtful questions of fact were taken from the jury and resolved by the courts in favor of the employer. * * * And so it was that a goodly portion of the relief which Congress had provided employees was withheld from them."
>
> "[Since 1943, however,] * * * The historic role of the jury in performing that function * * * [of passing on disputed questions of fact] is being restored in this important class of cases." 336 U.S. at 68, 69.

In reversing the trial court's granting of a directed verdict for the defendant, the *Wilkerson* Court said: "[W]here jury trials are required, courts must submit the issues of negligence to a jury *if evidence might justify a finding either way on those issues*. . . . It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need only look to the evidence and reasonable inferences which tend to support the case of litigant against whom a peremptory instruction has been given." 336 U.S. at 55, 57.

Seven years later in *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 525-526, 76 S.Ct. 608, 100 L.Ed. 668, 671 (1956), (cited by Judge Brown in the *Chiasson* case as controlling in §905(b) cases) this Court made it clear that it was equally solicitous of the fact-finding prerogatives of the jury in Jones Act cases. Reversing the Second Circuit which had affirmed the district court's granting of a directed verdict for the employer of a tug crewman this Court said:

> "[I]t must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. *Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases.* '[W]e think these are questions for the jury to determine. . . . ."
>
> "Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

Lest there be any doubt, the *Schulz* Court cited *Tennant v. Peoria & P.U.T. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 88 L.Ed.

520, 525 (1944)[6], for the proposition that "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." 350 U.S. at 526, n. 9.

In *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268, 97 S.Ct. 2348 (1977), 53 L.Ed.2d 320, 335, Justice Marshall spoke for a unanimous Court and reiterated the premise that the LHWCA, including the 1972 Amendments, is entitled to broad interpretation equivalent to the Jones Act when he said:

> "The language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation. The Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongrous results.' *Voris v. Eikel*, 346 U.S. 328, 333, 98 L.Ed. 5, 74 S.Ct. 88 (1953)."

The Congressional Committee Reports unequivocably advanced safety of the maritime worker as the *sine qua non* of the 1972 Amendments to LHWCA:

> "It is the Committee's view that every appropriate means be applied toward *improving the tragic and intolerable conditions which take such a heavy toll upon worker's lives and bodies in this industry*. . . . Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same

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6/ Cited by Doucet in his application for rehearing to the Court of Appeals.

care as a land-based person in providing a safe place to work. *Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.*" H. R. Rep. No. 92-1141, 92nd Congress, 2d Session, 3 U.S. Code Cong. & Admin. News pp. 4699, 4702-95.

Diamond M's roustabouts and drillers could have easily prevented Herman Doucet's injury by performing their operational duties. Yet the Court of Appeals totally absolved Diamond M of responsibility.

Such decisions only encourage the offshore oil drilling companies to maintain their abysmal safety record. The mortality rate for oil drilling workers in Louisiana's onshore and offshore oilfields for the years 1973-1979 was 188-283/100,000 workers per year. This compares to a mortality rate of 14/100,000 for all U.S. workers and 57/100,000 for a high-risk industry such as construction.[7] Thus, working offshore is much more hazardous than building skyscrapers or mining coal! It will not get safer if appellate courts are allowed "willy nilly" to reverse jury verdicts for injured offshore oil workers.

There are only two federal statutes which allow maritime workers recovery for negligence: the Jones Act and §905 (b). The dangers encountered by offshore oilfield workers in the Gulf of Mexico are no different whether the fortuitous circumstances of their employment result in their designation as "seamen" or "maritime workers" under OCSLA and §905 (b). Gilmore and Black, The Law of Admiralty (2nd Ed.), p. 454, authoritatively suggests: "The longshoremen. . . are on the ship in furtherance of the shipowner's commercial

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7/ Morbidity and Mortality Weekly Report, Center for Disease Control, Atlanta, Ga.; May 23, 1980, Vol. 29, No. 201.

interests. They are . . . doing the ship's work - arguably, work that at one time was performed by the crew they are unquestionably subject to the ship's hazards." This Court should declare that jury verdict review standards for §905 (b) workers and seamen are the same, *ergo, Doucet's* jury verdict must stand.

II.

EVEN UNDER COMMON LAW STANDARDS OF APPELLATE REVIEW OF JURY VERDICTS THE COURT OF APPEAL IMPROPERLY SUBSTITUTED ITS OWN OPINION ON FACTS FOR THE OPINION OF THE JURY.

The Seventh Amendment to the United States Constitution says: "no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." Some eminent commentators profess to find a great distinction between the common law rules of appellate jury verdict review and the Jones Act and FELA rules. United States Supreme Court cases antedating the FELA suggest that the difference is more apparent than real.

Thus, in *Kane v. Northern Cent. R. Co.*, 128 U.S. 91, 32 L.Ed. 339, (1888), Mr. Justice Harlan, speaking for the Court, reversed a directed verdict for the defendant railroad on the question of contributory negligence, saying that the plaintiff was to be accorded "the benefit of every [fair] inference" from the evidence - which rule would certainly allow the Doucet jury to infer that the driller could hear Doucet's request to raise the pipe or that the driller's failure to do what he was on the rig to do (raise the casing to its proper position) was a cause of Doucet's injury.

Likewise, in the post-FELA common law case of *Gunning v. Cooley*, 281 U.S. 90, 84, 74 L.Ed. 720, 724 (1930), a

claim for medical negligence, this Court affirmed a jury verdict for the plaintiff in these words: "Where uncertainty as to the existence of negligence arises from a conflict in the testimony, the question is not one of law but of fact to be settled by the jury . . ." In *Doucet* the Court of Appeals bemoaned "this mass of inconsistent, sometimes contradictory, testimony," then presumed the power to resolve the contradictions contrary to the jury - a result flatly prohibited by *Gunning* which leaves resolution of conflicts to the jury.

In exceeding its appellate power, the Court of Appeals had recourse to a time-honored technique - it sought out isolated bits of testimony in a three day trial that supported its contention that plaintiff's testimony was inconsistent and totally ignored testimony which supported plaintiff's claim. For instance, the Court ignored Paul Montgomery's testimony that the roustabouts took the metal protectors off on the pipe rack to "possibly eliminate a problem that you might have later on while you are actually running the casing," (Tr. 327), and "just to facilitate removing it once you get it onto the floor" (Tr. 333), showing their purpose was to eliminate the very type of problem that caused Doucet's injury. When asked whether the work situation to loosen the cross-threaded protector would be better on the pipe racks than on the drilling floor, Mr. Montgomery responded "*on the pipe rack because you are in a position of having more people to work on that specific job and generally more time if you have trouble with a specific thread protector.*" (Tr. 333). Thus the Court of Appeals' conclusion that Montgomery made only a single statement showing that the roustabouts' failure to remove the protector was negligent is both inaccurate and unfair.

Robert Owen, a safety expert, testified that *the preferred method of applying force upon a wrench would be downward and that, therefore, it would have been safer to remove*

the protector from a cylindrical object, such as the joint of casing, while the object was laying horizontally on the pipe rack, rather than having to do so while the object was suspended from a cable (Tr. 317-18), and that he had recommended use of the rubber protectors to two casing companies because they would "eliminate the problems they have with removing protectors." (Tr. 309). Despite its obvious probative weight on the question of negligence, the Court of Appeals did not acknowledge Mr. Owen's testimony in its opinion. Future Legal Scholars who read *Doucet* will not know Owen testified at the trial. But the jury did! And so did the trial judge. By arbitrarily failing to acknowledge a key witness' testimony on a decisive issue the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 17, Supreme Court Rules.

The Court of Appeals weighed the testimony of one *witness*, Paul Montgomery, and labeled his testimony as "self-contradictory". 683 F.2d 892. But under common law rules, is it not the function of the jury to weigh conflicting testimony? In essence, if there are no conflicts, no jury question is created.

The Court of Appeals ignored the driller's admission that it was his job to pull up on the joint of casing so as to "*stop it here so that the men won't have to . . . bend over.*" (Tr. 83). Diamond M's safety supervisor, Hawkes, explained further: ". . . *in a lot of incidences he* (casing crewman) *would not even have to signal because he* (driller) *could see it* was already tied onto and he will go ahead many times and clutch the rig and pick the joint pipe up . . ." (Tr. 20). When the driller was asked whether he "would be looking at him [casing crewman] as it [the casing] was being guided in to be

sure that you stopped it at about the right height", Buchans' unequivocal response was "Yes, sir." (Tr. 82-83).

The Court of Appeals stated that the jury was entitled to conclude that Doucet asked the driller to pick up the pipe. Unaccountably, the Court of Appeals then absolved Diamond M of negligence, by finding that the driller *had not heard the request*. Once Diamond M's driller and its safety supervisor admitted that the driller had the duty to move the casing to a safe working position, was the jury not free to hold the driller negligent for his failure to so do - whether or not a request was made? Has the Court of Appeals not reweighed the evidence and inferences and reached its own conclusion in holding that the driller had not heard Doucet's request? Was it not as reasonable for the jury to have concluded that the driller heard Doucet or more importantly, *that he should have heard his request*?

Even under common law rules for jury verdict review under the Seventh Amendment the Court of Appeals departed so far from the norms of judicial process that this Court should grant a writ of certiorari to petitioner.

III.

THE COURT OF APPEALS REQUIRED HERMAN DOUCET TO ASSUME THE RISK OF INJURY CREATED BY THE FAILURE OF DEFENDANT'S ROUSTABOUTS AND DRILLER TO PERFORM THEIR ASSIGNED TASKS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

"Assumption of risk" is not a defense to a §905(b) negligence suit. *Scindia Steam Navigation Co. v. De Los Santos*,

supra, 451 U.S. at 165-166 n. 13. While the Fifth Circuit has rendered ritualistic homage to this principle, even a cursory examination of its decisions reveals that since the enactment of §905(b) the Fifth Circuit has routinely applied a type of assumption of the risk to bar recovery by injured maritime workers.

For example, in *Hill v. Texaco, Inc.*, 674 F.2d 447, 452 (5th Cir. 1982) the Fifth Circuit reversed a judge's award of damages to a maritime worker who slipped and fell from a slippery and rusty ship tank by holding: "The tank, although wet, posed ONLY A LIMITED AND ACCEPTED HAZARD TO Hill" because he knew it was wet.

The Fifth Circuit said it did not matter if the drilling company roustabouts sent casing with a cross-threaded protector up to the floor to set the stage for Doucet's injury, or if the driller failed to lift the casing to a proper working position making Doucet's back injury more likely. Most revealingly, the Court of Appeals in Doucet said: "The pipe did not fall on him or strike him. He HURT HIMSELF while attempting to remove the metal protector." 683 F.2d at 890. Thus, the Court of Appeals presumed that the mere failure of the shipowner's employees to perform their duty was inconsequential. Apparently, the Court believed it was necessary for Doucet to show an active type of negligence (e.g., that Diamond M's employees hit him with the pipe) verging on gross negligence in order to recover. Mere failure to perform by the shipowner's employees is effectively deemed to create "only a limited and accepted hazard" to Doucet (see *Hill v. Texaco*, *supra*, 674 F.2d at 452), so long as Doucet could appreciate the risk of injury created thereby.

We submit that there are no "acceptable" observable hazards under §905(b) if they are created by the shipowner's

negligence. Writs should be granted to insure adherence to applicable decisions of this Court barring assumption of the risk as a defense to a §905(b) action.

IV.

IN REVERSING THE JURY AWARD OF $540,000 TO PETITIONER, THE COURT OF APPEALS CONTINUED TO IMPLEMENT ITS OWN OVERLY RESTRICTIVE STANDARD OF SHIPOWNER NEGLIGENCE INSTEAD OF THIS COURT'S DECISION IN *SCINDIA STEAM NAVIGATION CO. V. DE LOS SANTOS.*

The Fifth Circuit's decision in *Doucet* embodies a narrowly restrictive interpretation of "negligence" under §905(b). The Fifth Circuit has over-reacted to the 1972 Amendments to LHWCA which were designed to affect a simple trade: maritime workers got increased compensation benefits but lost the right to sue the shipowner for unseaworthiness. After passage of the 1972 Amendments and before this Court's decision in *Scindia*, the Fifth Circuit denied recovery to §905(b) plaintiffs in 78.6% of its decisions which finally adjudicated the rights of the litigants. Appendix 8, p. A-58. By and large, the Fifth Circuit adopted restrictive definitions of "negligence" which imposed assumption of the risk upon the plaintiff and allowed the defendant to escape liability under §905(b) unless it was guilty of a type of gross negligence. Mere violation of ordinary prudence was not deemed sufficient to constitute "negligence". *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233, 1238 (5th Cir. 1977) applied to §905(b) the archaic rules of Restatement (Second) of Torts, Sections 342, 343 and 343-A, which delineate the duties of a possessor of land to licensees. Under this approach the shipowner was liable for injuries to maritime

workers caused by dangerous conditions aboard the vessel only if the danger were such that the shipowner should expect the worker "invitees" "will not discover or realize the danger, or will fail to protect themselves against it."

Happily, in 1981 this Court re-established the legislative intent of §905(b) in *Scindia Steam Navigation Co. v. De Los Santos, supra. Scindia* held that: The shipowner "has a duty with respect to the *condition* of the ship's gear, equipment, tools and work space to be used in the stevedoring operations; and *if he fails at least to warn the stevedore* of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman." 451 U.S. at 167.

Scindia clearly envisions that "contract provisions" or custom can define the shipowner's duties under §905(b). *Scindia Steam Navigation Co. v. De Los Santos, supra*, 451 U.S. at 172, 176 n. 23. Diamond M's contract with Chevron is part of the record in *Doucet*. The contract specifies that Diamond M is to provide roustabout services and a driller to run the drilling rig. All parties to *Doucet* admitted that both the contract and custom of the drilling trade imposed upon the roustabouts a duty to install the rubber protectors on the pipe rack and upon the driller a duty to lift the pipe to a safe working condition. Neither the roustabouts nor the driller performed their duties. Yet the Court of Appeals did not so much as mention the existence of a contract in its opinion, and airily dismissed custom as "relevant but not conclusive as to a defendant's negligence." 683 F.2d at 892. In failing to find plaintiff's proof of Diamond M's violation of its contractual and customary duties sufficient evidence of negligence, the Court of Appeals patently violated *Scindia*, thereby deciding "a federal question in a way

in conflict with" an applicable decision of this Court and justifying review of this case on certiorari. Supreme Court Rule 17.

Scindia assumed *a priori* "that the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care *to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel* during the stevedoring operation." 451 U.S. at 167. Presumably, the same reasoning would apply to hold oil drilling vessel owners liable for failure "to avoid exposing" casing crew workers "to harm from hazards" they encounter on drilling rigs under the active control of the vessel during the casing operation. In *Doucet*, the Court of Appeals admitted that *Scindia* provided the proper standard, 683 F.2d at 890, but then aborted the jury's proper application of the due care standard, finding that the vessel was not responsible for the hazards which injured *Doucet*. The unspoken premise of this decision was: the risks of trying to remove the protector with the wrench were apparent to *Doucet*, so the ship's employees were absolved from the responsibility of having created the risks. This re-introduces assumption of risk in flat violation of *Scindia's* prohibition against that doctrine.

Of eight *post-Scindia* cases where the Fifth Circuit decision finally determined the maritime workers' §905(b) rights, only two have been won by the maritime worker. Appendix 8, p. A-58. Thus the shipowner has been winning 75% of the *post-Scindia* final decisions as compared to 78.6% *ante-Scindia*.

Apparently, it is *still* the Fifth Circuit's view that a shipowner cannot be held liable under §905(b) for ordinary negligence, in the sense of *failing to do* what an ordinary prudent

man would do. One may hazard a guess that if Diamond M had done something as dramatic as dropping the casing on *Doucet*, he might have recovered. The Court of Appeals language suggests this when it said "the pipe did not fall on him or strike him." Such drastic active negligence is not required by §905(b).

One is led to the inescapable conclusion that the Fifth Circuit is still applying the same restrictive interpretation of §905(b) negligence now as it did before *Scindia*. Conclusive proof of this is the statement by Judge Politz for the Court in *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243,1247, (5th Cir. 1982): "WE CONCLUDE THAT *SCINDIA* DID NOT CHANGE THE LAW IN THIS CIRCUIT AS RELATED TO THE SITUATION PRESENTED BY *PLUYER*." (i.e., a defective ship's ladder). Judge Politz was one of the three judges who decided *Doucet*.

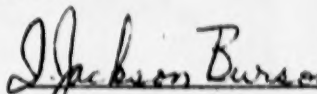
CONCLUSION

This Court should grant certiorari in *Doucet* to decide the important unsettled question of the proper standard of jury verdict review under §905(b). Finally, like the sole parade watcher who noticed that the Emperor's new clothes were really no clothes at all, we are constrained to note that the Court of Appeals opinion was no more than a re-examination of facts tried by the jury regardless of the semantic camaflouge in which it is disguised. As the final guardian of the integrity of the Seventh Amendment, as of all our Constitution, only this Court can right the wrong done to Herman Doucet.

For all these reasons, petitioner respectfully prays that his Petition for Writs of Certiorari be granted and that after

consideration by this Honorable Court that the jury verdict in favor of Herman Doucet be reinstated.

December 16, 1982.

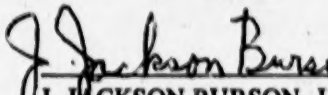


I. JACKSON BURSON, JR.
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has this day been forwarded to all attorneys of record by depositing the same in the United States Mails, postage prepaid and properly addressed to the said attorneys.

Eunice, Louisiana, this 16 day of December, 1982.



I. JACKSON BURSON, JR.
YOUNG & BURSON
Counsel for Petitioner

APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-3796

HERMAN J. DOUCET,
Plaintiff-Appellee,

versus

DIAMOND M. DRILLING COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Filed September 23, 1982

(Opinion August 23, 5 Cir., 1982, _____ F.2d ___).

(SEPTEMBER 22, 1982)

Before COLEMAN, POLITZ and GARWOOD, Circuit Judges

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing

En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL
RULE 17 FOR STAY OF THE
MANDATE

APPENDIX 2

[4302]

DOUCET v. DIAMOND M. DRILLING CO.

Herman J. DOUCET, Plaintiff-Appellee,
v.
DIAMOND M DRILLING COMPANY,
Defendant-Appellant.

No. 80-3796

United States Court of Appeals,
Fifth Circuit.

Aug. 23, 1982.

Pusher for independent oil well casing operator sued owner of submersible offshore drilling barge to recover for back injuries sustained while attempting to remove metal protector from pipe threads. The United States District Court for the Western District of Louisiana, W. Eugene Davis, J., rendered judgment for the pusher, and owner appealed. The Court of Appeals, Coleman, Circuit Judge, held that: (1) pusher failed to show that owner was negligent in failing to replace metal protector with a rubber one, and (2) pusher failed to show that owner's employee heard and failed to comply with pusher's request to raise the casing pipe a little higher to an arguably more safe position.

Reversed.

1. Federal Civil Procedure key 2126, 2608

On motions for directed verdict and for judgment notwithstanding the verdict the court considers all of the evidence, not just the evidence which supports the nonmover's case, but in the light and with all reasonable inferences most favorable to the party opposed to the motion.

2. Federal Civil Procedure key 2144, 2608

If facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of a motion for directed verdict or for judgment n. o. v. is proper but if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair minded men in exercise of impartial judgment might reach different conclusions, the motion should be denied.

3. Federal Civil Procedure key 2146, 2608

A mere scintilla of evidence is insufficient to present a jury question and insufficient to defeat a motion for directed verdict or for judgment n. o. v.

4. Federal Civil Procedure key 2151, 2608

Motions for directed verdict and judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict, and there must be a conflict in substantial evidence to create a jury question.

5. Federal Civil Procedure key 2148, 2608

It is the function of the jury as the traditional finder of facts, and not the courts, in ruling on a motion for directed verdict or judgment n. o. v., to weigh conflicting evidence and inferences and determine credibility of witnesses.

6. Shipping key 84(1)

Where both the vessel and a longshoreman employed by an independent contractor work concurrently on the same operation, the vessel is liable if it negligently injures the longshoreman or fails to exercise reasonable care under the circumstances to avoid exposing him to harm from hazards he might encounter from causes under the active control of the vessel. Longshoremen's and Harbor Workers' Compensation Act, §5(b), 33 U.S.C.A. §905(b).

7. Shipping key 84(5)

Defense of assumption of risk was unavailable to owner of submersible oil drilling barge as regards claims of pusher for independent oil well casing company to recover for back injuries sustained aboard the barge. Longshoremen's and Harbor Workers' Compensation Act, §5(b), 33 U.S.C.A. §905(b).

8. Shipping key 84(2)

Failure of roustabout employed by owner of submersible oil well drilling barge to remove metal protector from pipe threads did not give rise to liability on part of owner for back injury sustained by pusher for independent casing operator in removing the protector absent evidence that sending pipe to drilling floor with the protector was unusual or represented a foreseeable hazard to the experienced pusher. Longshoremen's and Harbor Workers' Compensa-

tion Act, §5(b), 33 U.S.C.A. §905(b).

9. Shipping key 86(2¾)

Independent casing operator crew pusher who was injured on board of submersible drilling barge, had burden of establishing actionable negligence on part of the vessel by a preponderance of evidence under the *Scindia* standard, which governs vessel liability, and that burden could not be met through self-contradictory testimony of a single expert witness, especially where that testimony was outweighed by the other uncontradicted evidence. Longshoremen's and Harbor Workers' Compensation Act, §5(b), 33 U.S.C.A. §905(b).

10. Shipping key 84(2)

Operation in a manner similar to that used by others is relevant but not conclusive as to a vessel's negligence and liability to a longshoreman as ultimate issue is whether the vessel negligently used a procedure which it knew, or in exercise of due care should have known, was unsafe. Longshoremen's and Harbor Workers' Compensation Act, §5(b), 33 U.S.C.A. §905(b).

11. Shipping key 86(2¾)

Independent well casing operator's pusher, seeking to recover from owner of submersible drilling barge for back injuries sustained while attempting to remove metal protector from pipe thread, failed to establish that owner's driller in charge of pipe lift heard but failed to heed pusher's request to raise a pipe, which pusher believed was too low to permit safe removal of thread protector, a little higher to an arguably more safe position. Longshoremen's and Harbor Workers' Compensation Act, §5(b), 33 U.S.C.A. §905(b).

Appeal from the United States District Court for the Western District of Louisiana.

Before COLEMAN, POLITZ and GARWOOD, Circuit Judges.

COLEMAN, Circuit Judge.

Herman J. Doucet injured his back while working as a pusher for an oil well casing crew on a submersible drilling barge in the Gulf of Mexico, twenty miles off the Louisiana shore. Upon suit brought under 33 U.S.C., §905(b), 1/ a jury in the Western District of Louisiana absolved Chevron U.S.A., Inc. of negligence and found that Diamond M Drilling Company was guilty of negligence proximately causing

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1/ The statute in question, §905(b), provides:

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof may bring an action against such vessel as a third party in accordance with the provisions of §933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Doucet's injuries. His damages were assessed at $600,000, reduced by ten percent for his contributory fault. Judgment was entered for $540,000 less $65,213.64 awarded American Home Assurance Company as the intervening Diamond M compensation carrier. Diamond M appeals. We reverse.

As operator, Chevron U.S.A., Inc., contracted with Diamond M for the drilling of the oil well, off the coast of Louisiana. Diamond M supplied the submersible drilling barge EPOCH, the drilling crews, and the roustabout crews. Chevron contracted with Offshore Casing Crews, Inc., Doucet's employer, for the oil well casing operations which were to be prosecuted on board the vessel.

April 21, 1977, aboard the EPOCH, Doucet was the foreman (pusher) of the five man casing crew employed by and working for Offshore, executing the casing contract for Chevron. The casing crew was working in conjunction with the roustabouts employed by the vessel. Doucet had five years experience as a pusher, and had worked on many similar jobs, which usually ran five to ten to twenty-four hours, depending upon weather and other conditions.

Beginning at approximately 11:30 P. M., the casing crew spent an hour and a half getting the casing equipment ready to go. A trolley line was rigged from the drill floor to the pipe rack. At Chevron's direction, Doucet's crew had brought five rubber thread protectors aboard the EPOCH. They were to replace the metal thread protectors originally attached to the end of each pipe joint to protect the threads from damage while being moved about from place to place. The casing crew showed the Diamond M roustabouts how to replace the metal protectors with the rubber ones before sending the pipe along to the platform. As a matter of fact, the casing crew removed the first five metal protectors and put

on the rubber ones while the joints lay on the pipe rack. The casing crew then returned to the rig floor and began operations.

When the pipe is taken from the pipe rack and arrives at the point where it is to be set in the drilling hole the rubber protector is unsnapped and sent back down the trolley to be used on the succeeding joints.

In six to seven years work in casing operations, Doucet was experienced in taking off both metal and rubber pipe thread protectors and had worked with metal protectors on approximately half of the jobs he had been on. The casing pipe joints were hoisted from the pipe rack onto the drilling floor by the draw works which were operated by the driller, a Diamond M employee. Doucet would unsnap the rubber protectors from the joints and guide the joints into the drill hole. After running about an hour of casing (twenty to twenty-five lengths), Doucet noticed that a drilling floor worker was unable to remove a metal protector. Intending to remove the metal protector, Doucet picked up a 36 inch pipe wrench and placed it around the protector. Upon applying the wrench Doucet says he realized that the pipe was hanging too low, that is, about 2½ feet off the drilling floor (Doucet was only 5½ feet tall) so he "hollered to" the driller, a Diamond M employee, to "raise the joint a little". Hand signals are often used in such a situation but Doucet was holding the wrench with both hands and in that position could not give a hand signal. The driller was somewhere between ten and twenty feet away. At trial, the driller did not recall the incident, but testified that such a verbal request if given and heard would have been complied with as a matter of course. For whatever reason, the joint remained below waist level and Doucet did not repeat his request,

he did not wait on a lift, and there is no evidence that he asked for the assistance of a welder to cut off the metal protector with a blow torch. Instead, he energetically jerked on the metal protector six or seven times and then felt a hard pain in his back. This took place around 2 A. M. on April 22, 1977, and that is what this litigation is about.

After the incident, Doucet quit working because of the pain in his back but remained aboard the EPOCH until the job was completed. For eight or ten days afterward he did not go to a doctor. He had had two back injuries prior to this one. Fourteen years previously he had fractured three vertebrae and was unable to work for six weeks. The second injury occurred about 1975 when Doucet pulled a muscle in his back and missed three to four weeks of work. Doctors were of the opinion that because of his back condition Doucet could not permanently return to heavy manual work, such as that of a longshoreman or roughneck. His fourth grade education substantially restricted his possibilities of finding sedentary work. An expert testified that the injuries caused a loss of $561,385.80 in future wages and this testimony was not contradicted.

At trial, Doucet asserted that Diamond M was negligent in that it had failed to replace the metal protector with a rubber one, and in failing to raise the casing pipe "a little higher" when requested to do so.

Diamond M claims that *as a matter of law* the evidence was insufficient to generate a factual issue regarding its alleged negligence; therefore, the District Court erred in not granting its motions for directed verdict, for judgment notwithstanding the verdict, or for a new trial. Alternatively, it is said that the trial judge abused his discretion in fail-

ing to order a remittitur or a new trial on the issue of damages. Diamond M argues that it owed no legal duty to Doucet to remove the protector or to raise it, and if such a duty did exist any breach thereof was not the legal cause of Doucet's injury. Finally, it argues that Doucet's disregard for his own safety was the sole legal cause of his injury.

[1-5] As to activity on a submersible barge oil drilling rig in the Gulf of Mexico, this case is very similar to that decided by this Court in *McCormack v. Noble Drilling Corporation*, 608 F.2d 169 (5th Cir. 1979). There, the standard of review for the sufficiency of the evidence in such cases was announced as "firmly established", to-wit, that of *Boeing Company v. Shipman*, 411 F.2d 365, 374, 375 (5th Cir., 1969) (en banc).[2]

2/ On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence - not just that evidence which supports the non-mover's case - but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses (Footnote omitted).

I

[6, 7] This is a case in which both the vessel and the longshoremen employed by the independent contractor, Offshore, were working concurrently on the same operation. In these circumstances the vessel would be liable if it negligently injured the longshoreman or if it failed to exercise reasonable care under the circumstances to avoid exposing him to harm from hazards he might encounter from causes under the active control of the vessel, *Scindia Steam Navigation Company, Ltd. v. De Los Santos*, 451 U.S. 156, 167, 101 S. Ct. 1614, 1622, 68 L.Ed.2d 1 (1981). *Scindia* says that "Congress intended to make the vessel answerable for its own negligence", 101 S. Ct. at 1622. 3/ We think *Scindia* means that in the case now before us the decisive issue is whether the evidence could justify a finding by a reasonably minded jury that Diamond M negligently exposed Doucet to a hazard which it knew, or in the exercise of reasonable care under the circumstances should have known, would proximately cause his injury.

II

We have analyzed and reanalyzed the record in this case to see whether Doucet offered enough evidence to meet the *Scindia* test. Our task has not been made any easier by the fact that Diamond M was so confident of its position that it offered no testimony of its own. Even so, we find ourselves unable to avoid the firm conviction under *Boeing* standards that Doucet must lose this appeal.

3/ The defense of assumption of risk is unavailable in §905(b) litigation. Diamond M may not defend on the ground that Doucet should have refused to proceed until the rubber protector had been installed. *Scindia*, 101 S. Ct. at 1626, note 22.

We first consider the failure of the Diamond M roustabouts to remove the metal protector from the length of pipe on which Doucet hurt himself and their corresponding failure to install the rubber protector before sending the pipe to the drilling floor.

The evidence is clear that Chevron had directed that the metal protectors be replaced with the rubber protectors, had furnished them for that purpose, and Doucet had brought them aboard. As a general proposition, it is clear that the Diamond M crew had agreed to use them but there was no testimony from anybody on the drilling platform, from Doucet or anybody else, that it had been understood that the roustabouts would remove stuck or "tight" metal protectors before sending them up. Many forty foot sections of 13 3/8 inch pipe had previously come up with the rubber protectors and had been installed without complication. From Doucet's testimony it appears that there had been between twenty and twenty-five of these sections. There was testimony from at least two of Doucet's witnesses that the metal protectors had been cross threaded. None of the litigants called any of the roustabouts as witnesses in search of an explanation for sending up this section of pipe without the metal protector. We think the jury could reasonably infer from the evidence that the roustabouts found it either difficult or impossible to remove the metal protector, so they simply sent it to the drilling floor where the casing crew would have to deal with it, but neither the pipe section nor the metal thread protector injured Doucet. The pipe did not fall on him or strike him. He hurt himself while attempting to remove the metal protector.

Therefore, the decisive issue becomes: Did the evidence in a manner that could have been accepted by a reasonably

minded jury show by a preponderance of the evidence that the Diamond M roustabouts negligently exposed Doucet to a hazard which they knew, or in the exercise of "reasonable care under the circumstances" should have known, would put him to the hazard of personal injury?

Doucet had only a fourth grade education but upon reading his testimony one is impressed by his ability to respond to questions clearly, logically, and succinctly. Doucet did not say that sending the pipe up with a metal thread protector was unsafe or that it presented him with an unusual or an unexpected hazard. He complained only that he got hurt because the driller had not raised it a little higher when asked to do so. Doucet testified (Tr. 260) that he had previously used Stillson wrenches to loosen stuck metal protectors, that it was not an uncommon practice, that over half the jobs on which he had worked used metal protectors. He said that sometimes the metal protectors can be taken off by hand, sometimes with a wrench, and sometimes they had to be burned off by a welder, that burning them off was not unusual.

At page 263 of the transcript we find the following:

> Q. Was there any way that you could tell whether or not that steel protector would come off easily with the pipe wrench until you pulled on it?
>
> A. (By Mr. Doucet) No, no, that happened many times where we had to put the wrench on. Sometimes they come off easy with the wrench, sometimes you got trouble.

[8] We conclude that there was no evidence, directly or by inference, that sending the pipe up with the metal protector was unusual or presented a foreseeable hazard of personal injury to an experienced casing crew pusher, as Mr. Doucet undoubtedly was.

On the other hand, there was much testimony from many sources (all of it adduced on behalf of Mr. Doucet) that the chief function of the rubber thread protector is to expedite the casing work; that the protectors are not used to improve the safety of the operation; and in 25% of the cases metal protectors will have to be *cut off* before using the pipe.

However, Doucet presented the testimony of Paul Montgomery, a petroleum engineer, testifying as an expert, who said that 60% of his current income came from supplying expect testimony in court for parties plaintiff and defendant. He had never seen or inspected the Diamond M drilling rig.

At page 327 of the transcript he testified that he liked "to use quickie (rubber) protectors[']*not from a safety consideration, but for other considerations'* (emphasis added).

Mr. Montgomery was then asked to state the reasons for using the rubber protectors. He responded (Tr. 328):

A. First off, I would like to take the metal protectors off the pipe while its on the racks and it gives you an opportunity to look at the threads and possibly eliminate a problem that you might have later on while you are actually running the casing. Also, if necessary, you can clean the threads then put the metal protectors back on just hand tight and since you only have a limited supply of quickie

protectors, you put them on just before you take the pipe up onto the rig floor to be run. It saves a great deal of time for the casing crew and speeds up the operation in my experience to use quickie protectors.

At page 336, we see the following testimony from Mr. Montgomery:

Q. Have you ever had any experience where rubber protectors had been ordered and were present on the job when they weren't used and the metal protectors were used instead?

A. I have had occasions where we had rubber protectors and we were using them where a joint occasionally would come up on the floor with the steel protectors still on it because it was cross threaded, because they had not been able to get it off on the pipe rack, but that is the exception rather than the rule. rule.

Q. And in those cases, how would you normally take if off?

A. Start with a sledge hammer, if it's cross threaded and try to get it back even or level if at all possible and the next thing that I would think about doing would be to weld a lug, a nut or something of the sort on the side of the protector and using the hammer some more. Generally, that will get it off short of cutting the protector.

Finally, (Tr. 337) Mr. Montgomery testified:

Q. In this particular case, do you have an opinion as to whether the failure to remove the metal protector on the pipe rack and to replace it with a rubber protector made that casing operation unsafe at that time?

A. Yes, I think it should have been removed on the pipe rack.

This one answer is the sole and only evidence in this record upon which a jury could rely in finding, if it did so find, that sending up the pipe with the metal protector amounted to actionable negligence. Yet, Mr. Montgomery stated at the very beginning of his testimony that the use of rubber protectors was NOT FOR SAFETY REASONS but for other reasons.

[9, 10] Mr. Doucet had the burden of establishing actionable negligence by a preponderance of the evidence under *Scindia* standards and that burden simply could not be met by the self contradictory testimony of a single witness, especially when that statement is balanced against all the other uncontradicted evidence in this record 4/ and heretofore set forth in this opinion. This is most cogently so because Mr. Doucet testified (Tr. 196) as follows:

Q. What is the purpose of these rubber protectors? What good do they do you on the job?

4/ **The Court is aware of the rule that operations in a manner similar to that used by other companies is relevant but not conclusive as to a defendant's negligence, *McCormack v. Noble Drilling Corporation*, 608 F.2d 169 (5th Cir., 1979). The ultimate issue is whether the defendant negligently used a procedure which it knew, or in the exercise of due care should have known, was unsafe.**

A. Try to protect the threads on the joint and faster - makes it a faster job.

III

[11] This means, of course, that Mr. Doucet's recovery must stand or fall on that theory of the case which he developed in his own testimony, which may fairly be stated, as follows: Diamond M's driller in charge of the pipe lift saw that Doucet was trying to remove a metal thread protector and when requested to lift the pipe a little higher (to an arguably more safe position) he neglected to do so, thus contributing to the injuries to the crew leader's back.

We begin our analysis of this aspect of the case by looking first to Mr. Doucet's testimony.

Q. When that joint came up with the metal protector on, did you ask the driller to do anything?

A. While I was taking it off?

Q. Yes, sir.

A. While I was jerking on it?

Q. Yes, sir.

A. Yeah, I asked him to pick it up a little.

Q. Did he do it?

A. No.

(Tr. 201).

At a later point, (Tr. 202):

"I went and got me a 36 inch pipe wrench and I put it on and I - when I first put it on I realized that my pipe was too low so I looked at the driller and I hollered at him - I couldn't make any signs with my hands - both my hands were tied up and I hollered at him to pick up a little and he didn't so I started jerking on it."

At a later point, (Tr. 238):

Q. Now, when you told him that, was Mr. Buchan (the driller) looking at you?

A. Yes, sir.

Q. What did he do?

A. Nothing.

Q. Did he say anything back to you?

A. No.

Q. When Mr. Buchan didn't respond to that "pick up the pipe a little", you then went on ahead and pulled on it anyhow, sir?

A. Jerked on it, yeah.

The members of Mr. Doucet's crew were Terry Meche, Emery Richard, Dale Briscoe, and Glenn Bourgeois.

Terry Meche saw the episode from forty five feet up in the tower. Introduced as a witness for the plaintiff he said

nothing about hearing Doucet "holler" at Buchan, the driller, so it must be assumed that the "holler" could not be heard at a distance of forty five feet. He said Buchan was situated between twenty and twenty five feet from where Doucet was using the wrench. Did Buchan hear the holler, or should he have heard it if he had been paying attention to his business? We must assume that he was paying attention because Doucet testified that Buchan was looking at him at the time.

When Buchan was put on the witness stand he had no memory of the incident, so he could shed no light on it whatever.

Emery Richard testified that he was a floor hand on Doucet's crew, operating the tongs. He was standing on a platform five or six feet high located five or six feet from Doucet, between Doucet and the driller and the driller was on the floor only five or six feet from Richard. Richard said he heard Doucet ask the driller "to kind of pick up a little higher". He never saw Doucet use hand signals at any time but Doucet testified that he used hand signals at all times when he did not have his hands on the wrench.

Dale Briscoe worked the V-door. He said he saw the injury take place but also said that it took place in the daytime, the sun was out, whereas Doucet and Richard testified that it took place at 2 A. M. He was eight feet from Doucet. He gave no testimony concerning Mr. Doucet hollering to Buchan to raise the pipe.

Glenn Bourgeois was called as a witness by Doucet. He was on a stand three feet high, handling the mud and joining the pipes. He said that rubber protectors were used because they made the job go faster and smoother. He was not

looking at Doucet when he got hurt. He thought Doucet was not over ten feet from the driller. He said the injury occurred *in the morning, before lunch.* He said Doucet gave a hand signal for Buchan to raise the pipe. Then (Tr. 155) Bourgeois said that the casing crew used hand signals most of the time "because a rig is very noisy, you have to scream to the top of your head to make him understand you".

In this mass of inconsistent, sometimes contradictory, testimony, all adduced by Doucet in support of his claim, could a reasonably minded jury have found by a preponderance of the evidence that the driller, Buchan *heard* and *ignored* the "hollered" request to raise the pipe a little higher?

Boeing teaches that on motions for a directed verdict all of the evidence must be considered along with all reasonable inferences most favorable to Doucet. If the facts and inferences point so strongly and overwhelmingly in favor of a particular party that reasonable jurors could not arrive at a contrary verdict the motion may properly be granted. If there was substantial evidence in support of Doucet, such as that might cause reasonable jurors to differ about it, the verdict must be left undisturbed. However, a mere scintilla of evidence is insufficient to present a question for the jury.

The jury had a right to believe Doucet's testimony that he "hollered" at Buchan to raise the pipe. He said Buchan was looking at him, but he took no action. Buchan could have heard Doucet. Did he, in fact, do so? A close examination of the record shows that on this issue the jury was left to rely on speculation and conjecture. His witness said that a drill rig is so noisy that you have to scream at the top of your head to be heard. Inferentially, Doucet concedes

this because he said he "hollered". Richard, stationed five or six feet horizontally and the same distance vertically from Doucet says he heard the "holler" but he was stationed between Doucet and the driller. Two other witnesses, Doucet's witnesses, as close to Doucet as Emery Richard, said nothing about hearing the "holler". Indeed, one of them went so far as to say that he never saw anything but hand signals on this particular job on board the EPOCH and Doucet testified himself that he had used hand signals when not holding the wrench.

Could reasonable jurors differ over whether substantial evidence supported an inference that the driller had heard the "shouted" request and simply failed to honor it?

On this issue, we are left with an abiding conviction that they could not. Therefore, the directed verdict on behalf of Diamond M should have been granted.

The judgment of the District Court is

REVERSED.

APPENDIX 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

HERMAN J. DOUCET

VS. CIVIL ACTION NO. 780431

DIAMOND M DRILLING COMPANY ET AL

MINUTE ENTRY

September 16, 1980

The motions filed by Diamond M Drilling Company for directed verdict, judgment n. o. v., remittur and new trial are hereby denied.

Lafayette, Louisiana, this 15th day of September, 1980.

/s/ W. Eugene Davis
Judge, United States District Court

APPENDIX 4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION
CIVIL ACTION NO. 780431

HERMAN J. DOUCET

VERSUS

DIAMOND M DRILLING COMPANY ET AL

JUDGMENT

FILED JULY 3, 1980

This action came on for trial before the Court and Jury, the Honorable W. Eugene Davis, District Judge, presiding, the issues having been duly tried, the Court having instructed the jury to make answer to certain special interrogatories, and the jury having duly rendered a verdict and having made answer to said special interrogatories as follows:

We, the jury in the above entitled action, find from a preponderance of the evidence as follows:

INTERROGATORY NO. 1: Was defendant Diamond M Drilling Company guilty of negligence which was a proximate cause of Herman J. Doucet's injuries?

ANSWER "YES" OR "NO"

ANSWER Yes

INTERROGATORY NO. 2: Was defendant Chevron U.S.A., Inc., guilty of negligence which was a proximate cause of Herman J. Doucet's injuries?

ANSWER "YES" OR "NO"

ANSWER No

If your answers to both of the above interrogatories were "no," proceed no further. Have you foreperson sign the verdict in the space provided below and report to the Marshal in order to return these answers into court.

If your answer to either of the above interrogatories was "yes," proceed to Interrogatory No. 3.

INTERROGATORY NO. 3: a) Was plaintiff, Herman J. Doucet, guilty of negligence which was a proximate cause of his injury?

ANSWER "YES" OR "NO"

ANSWER Yes

b) If your answer to Interrogatory No. 3(a) was "yes," to what extent was the negligence of plaintiff responsible for the accident? Answer by means of a numerical percentage from 0% to 100%;

ANSWER 10%

INTERROGATORY NO. 4: What amount, if any, do you find will adequately compensate the plaintiff, Herman J. Doucet, for the damages sustained by him as a result of his injury, WITHOUT ANY REDUCTION FOR ANY PERCENTAGE OF CONTRIBUTORY NEGLIGENCE WHICH

YOU MAY HAVE FOUND ON HIS PART? Answer by means of a numerical figure.

ANSWER $600,000

IT IS ORDERED AND ADJUDGED that intervenor, American Home Assurance Company recover from defendant, Diamond M Drilling Company the sum of SIXTY-FIVE THOUSAND TWO HUNDRED THIRTEEN AND 64/100 ($65,213.64) DOLLARS, together with legal interest from date of judgment until paid, and its costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff, Herman J. Doucet recover from defendant, Diamond M Drilling Company the sum of FOUR HUNDRED SEVENTY-FOUR THOUSAND SEVEN HUNDRED EIGHTY-SIX AND 36/100 ($474,786.36) DOLLARS, together with legal interest from date of judgment until paid, and his costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that the suit of plaintiff, Herman J. Doucet, against defendant, Chevron U.S.A. Inc., be and the same is hereby dismissed, with prejudice, at plaintiff's costs.

The Court expressly determines under Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason for delay and enters final judgment herein.

Thus Done and Signed at Lafayette, Louisiana, this 2nd day of July, 1980.

ROBERT H. SHEMWELL, CLERK
By: /s/ Illegible
Deputy Clerk

APPROVED AS TO FORM:
/s/ W. Eugene Davis
W. EUGENE DAVIS
UNITED STATES DISTRICT JUDGE

APPENDIX 5

33 U. S. C. §905(b):

"(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

APPENDIX 6

COMPILATION OF PRE-SCINDIA FIFTH CIRCUIT DECISIONS IN SECTION 905(b) CASES

CASE 1.

Slaughter v. S. S. Ronde Fyffes Group, Ltd., 509 F.2d 973 (5th Cir. 1975)

FACT SUMMARY

Ship listing-longshoreman injured while attempting to load roll of liner board. Gratings in hold alleged to be defective.

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge: held no negligence by ship.

FIFTH CIRCUIT DECISION

Affirmed (Wisdom, Bell and Clark, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 2.

Parker v. South Louisiana Contractors, Inc., 537 F.2d 113 (5th Cir. 1976)

FACT SUMMARY

Truck driver delivering load of casing to be loaded onto

barges in the Atchafalaya River to be used in oil exploration activities over water was injured when he slipped in unlighted gap in loading ramp running between dock and barge. Jurisdiction urged: §905(b), Admiralty Extension Act, 46 U.S.C. 740, and 33 U. S. C. §903(a) granting compensation for injuries on "any adjoining pier, . . . or other adjoining area customarily used by an employer in loading, unloading . . . a vessel."

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: granted defendant's motion for summary judgment dismissing case on ground no maritime jurisdiction.

FIFTH CIRCUIT DECISION

Affirmed

(Tuttle, Ainsworth and Clark, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 3.

Smith v. M/V Captain Fred, 546 F.2d 119 (5th Cir. 1977)

FACT SUMMARY

Ship repairman sued vessel on which he was injured for its negligence as a third party under §905(b) even though owner of the vessel was also repairman's employer.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: granted motion to dismiss because repairman could not sue vessel owner because exclusive remedy against employer was compensation.

FIFTH CIRCUIT DECISION

Reversed and remanded for trial. Under *Reed v. The Yaka*, 373 U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 448 (1963) repairman could sue employer-shipowner for §905(b) negligence. (Coleman, Clark and Tjoflat, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 4.

Gay v. Ocean Transport & Trading, Ltd. and Guerra v. Bulk Transport Corp., 546 F.2d 1233 (5th Cir. 1977)

FACT SUMMARY

Cases of Two *longshoremen consolidated:*
(1) *Gay*: Air blower did not remove carbon monoxide fumes from propane forklift from unventilated reefer compartment, poisoning plaintiff.
(2) *Guerra:* Ship's boom knocked pallet from deck into hatch onto plaintiff.

TRIAL COURT DECISION:
(JURY OR JUDGE)

(1) Judge: summary judgment for vessel.

(2) Judge: *held* no negligence by ship.

FIFTH CIRCUIT DECISION

(1) Affirmed
(2) Affirmed

(Coleman, Clark and Tjoflat, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

(1) NO
(2) NO

CASE 5.

Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977) (Summary Calendar)

FACT SUMMARY

Large rack fell off stevedore's forklift onto operator in hold cleaning operations plaintiff alleges ship knew of longshoring health and safety violations.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: summary judgment for vessel.

FIFTH CIRCUIT DECISION

Affirmed No duty owed by ship to Brown, as a matter of law, "even if the ship's crew was aware of the danger posed by the unstable rack." 550 F.2d at 335.

(Wisdom, Thornberry & Tjoflat, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 6.

Bossard v. Exxon, 559 F.2d 1040 (5th Cir. 1977)

FACT SUMMARY

Barge cleaner asphyxiated while working inside large tank. Plaintiff claimed violations.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: granted Motion to Dismiss in nature of Summary Judgment.

FIFTH CIRCUIT DECISION

Affirmed
(Per Curiam: Gewin, Roney and Hill, Circuit Judges) Danger was open and obvious to deceased. Safety & health regulations for longshoremen impose duties on stevedore, not on shipowner.

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 7.

Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030 (5th Cir. 1977)

FACT SUMMARY

Employee of contractor hired to "free" barge of gasoline severely burned in explosion. Plaintiff alleged negligence in failure to provide safe place to work and to take extra precaution with ultrahazardous activity.

TRIAL COURT DECISION: (JURY OF JUDGE)

Judge: Directed verdict for defendant at close of plaintiff's evidence

FIFTH CIRCUIT DECISION

Affirmed

(Gervin, Roney and Hill, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 8.

Briley v. Charente Steamship Company, Ltd., 572 F.2d 498 (5th Cir. 1978) (Summary Calendar)

FACT SUMMARY

Longshoreman standing upon boxes of cargo *loaded at previous port* to reach shackle hook. Boxes were jumbled in a pile and plaintiff fell into space between cargo w. n his foot became tangled in a net not supplied by vessel. Plaintiff claimed vessel was negligent because it knew of hazardous condition and failed to correct it.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Summary Judgment for defendant shipowner.

FIFTH CIRCUIT DECISION

Affirmed:
(Per Curiam: Roney, Gee and Fay, Circuit Judges).

"The jumbled condition of the boxes was observed by plaintiff. It was within his power to correct." 572 F.2d at 500.

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 9.

Samuels v. Empresa Lineas Martimas Argentinas, 573 F.2d 884 (5th Cir. 1978)

FACT SUMMARY

Longshoreman unloading steel beams at night. Plaintiff

stepped backward into hole in unlit area.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Jury: Verdict for Plaintiff

FIFTH CIRCUIT DECISION

Affirmed:

(Skelton, Fay and Rubin, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

YES

CASE 10.

Wiles v. Delta Steamship Lines, Inc., 574 F.2d 1338 (5th Cir. 1978)

FACT SUMMARY

Longshoreman injured while working aboard ship. No other facts stated.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Decision for defendant prior to 5th Circuit's enunciation of §343A Restatement test in *Gay*

FIFTH CIRCUIT DECISION

Reversed and Remanded to apply §343A test, saying: "Our remand implies no opinion that a new trial . . . is necessary."

(Wisdom, Goldberg & Rubin, Circuit Judges, Per Curiam)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 11.

Stockstill v. Gypsum Corporation, 607 F.2d 1112 (5th Cir. 1979)

FACT SUMMARY

Ship repairer's welder employee fell from ladder descending into forepeak tank. Plaintiff shoved oil and grease on deck and ladder.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Directed verdict for Defendant.

FIFTH CIRCUIT DECISION

Affirmed

(Gervin, Ainsworth, Reavley, Circuit Judges) (Judge Reavley dissenting).

Majority: "the danger of the grease [was] open and obvious to Stockstill." 607 F.2d at 1117.

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 12.

McCormack v. Noble Drilling Corp., 608 F.2d 169 (5th Cir. 1979)

FACT SUMMARY

Noble drilling well for Chevron. Plaintiff was casing crew member tong operator. He was injured when tubing being lowered into well bent when power tongs applied causing tongs to spin around and pin him. Plaintiff alleged top of pipe should have been secured by rig elevators instead of only held by hand.

TRIAL COURT DECISION: (JURY OR JUDGE)

Jury: (1) Drilling contractor, Noble, negligent. (2) Well owner, Chevron, held negligent. (3) Plaintiff 20% negligent. Award of $376,000.

FIFTH CIRCUIT DECISION

(1) Affirmed as to Noble: who had "intimate involvement in the casing operation" (2) Reversed as to Chevron: No

participation in casing process.
NOTE: NO MENTION OF §905(b) STANDARD BY EITHER COURT. CASE TREATED AS ORDINARY TORT CASE

(Simpson, Charles Clark, and Frank Johnson, Jr., Circuit Judges).

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

YES

CASE 13.

Longmire v. Sea Drilling Corp., 610 F.2d 1342 (5th Cir. 1980)

FACT SUMMARY

Oil drilling roughneck injured aboard tender anchored adjacent to fixed drilling platform when he slipped while stowing anchor chains.

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge: Summary judgment for defendant - Plaintiff not seaman and no right to sue shipowner for negligence under §905(b).

FIFTH CIRCUIT DECISION

Affirmed
Summary Judgment on Seaman Status.
Reversed and *Remanded* for trial of §905(b) claim.

(Tuttle, Goldberg and Randall, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 14.

Hess v. Port Allen Marine, 624 F.2d 673 (5th Cir. 1980) (Summary calendar)

FACT SUMMARY

Employee same as in Case #7 above. Here suing owner of "gas freeing" facility alleging that it was owner *pro hac vice* of barge it had taken into custody to gas free and therefore, subject to suit for negligence under §905(b).

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Summary Judgment for defendant-relationship with vessel not sufficient to be owner pro hac vice.

FIFTH CIRCUIT DECISION

Affirmed:

(Brown, Tjoflat, and Frank M. Johnson, Jr., Circuit Judges)

(Per Curiam)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 15.

Hebron v. Union Oil of California, 634 F.2d 245 (5th Cir. 1981)

FACT SUMMARY

Painter employed to paint oil's platforms was ordered by Union Oil foreman to go aboard vessel to load an A-frame. While plaintiff was disengaging crane line from A-frame on board vessel, crane hook accidentally latched onto A-frame throwing plaintiff to deck ten feet below. Union Oil sued as owner *pro hac vice* of vessel under §905(b).

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge: Directed verdict for defendant and involuntary dismissal. No negligence.

FIFTH CIRCUIT DECISION

Affirmed.

(Ainsworth, Garza and Sam Johnson, Circuit Judges) (Per Curiam)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 16.

Mallard v. Aluminum Company of Canada, Ltd., 634 F.2d 236 (5th Cir. 1981)

FACT SUMMARY

Newsprint stacked 3 tiers high with plywood walking boards crisscrossed on top. Forklifts ran on plywood. Charterer provided boards. Plaintiffs alleged had warned shipowner tighter stow needed to avoid voids beneath boards. Boards cracked under wheel which slipped into void toppling forklift over on plaintiff, *paralyzing* him from chest down. Void was 1 ½ feet by 2 feet as opposed to normal 6 inches.

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge: (1) Dismissed Canadian Stevedore for lack of jurisdiction.
(2) Summary Judgment for vessel, its owner & charterer on grounds no negligence as a matter of law.

FIFTH CIRCUIT DECISION

(1) Affirmed
(2) Reversed and Remanded: Court must find whether plywood boards were obviously or latently defective to determine standard of negligence. If boards obviously hazardous, owner charterer might be absolved if "Mallard was in a better position to appreciate fully the hazard and avoid the danger." 634 F.2d at 245.

(Henderson, Politz & Williams, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 17.

Walker v. Blacksea S. S. Co., 637 F.2d 287 (5th Cir. 1981)

FACT SUMMARY

Longshoreman slipped and fell down ship's ladder obstructed by lashing wire strung across it as he was attempting to stoop to pass under wire.

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge: Shipowner 40% negligent and longshoreman 60% negligent.

FIFTH CIRCUIT DECISION

Affirmed.

(Ainsworth, Kunzig and Randall, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

YES

CASE 18.

Guidry v. Continental Oil Co., 640 F.2d 523 (5th Cir. 1981)

FACT SUMMARY

Casing crew pusher employed by Offshore Casing Crews hurt when fellow casing crew employee lifted elevators which swung over & crushed plaintiff's foot between 2,000

pound elevators and rotary table. *Guidry claimed Marlin had congested the floor unnecessarily by placing all the pipe on the floor contrary to normal practice.*

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Directed verdict for defendants well owner (Continental and Mobile drilling platform owner-Marlin) on §905(b) claim. Also imposed $500 sanction against plaintiff's counsel for transportation to rig for discovery photographs and inspection.

FIFTH CIRCUIT DECISION

Affirmed.

"If location of some of the tools afforded some obstacle to a safe performance of the work, the condition was perfectly apparent to all . . ." 640 F.2d 532.

(Brown, Ainsworth, Frank Johnson, Jr., Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

APPENDIX 7

COMPILATION OF POST-SCINDIA FIFTH CIRCUIT DECISIONS IN SECTION 905(b) CASES

CASE 1.

Roberts v. Andrew Martin Sea Services, Inc., 646 F.2d 1064 (5th Cir. 1981)

FACT SUMMARY

None given. Apparently an opinion already rendered was withdrawn after *Scindia* rendered.

TRIAL COURT DECISION: (JURY OR JUDGE)

UNKNOWN

FIFTH CIRCUIT DECISION

Remanded for application of *Scindia*.

(Dyer, Rubin and Politz, Circuit Judges).

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 2.

McCullough v. S. S. Coppename, 648 F.2d 1036 (5th Cir. 1981)

FACT SUMMARY

Longshoreman pulling loaded cart between deck which struck broken board on platform and tipped over, knocking longshoreman off balance causing him to fall through open hatch. Platforms not installed by stevedore.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Summary Judgment for vessel rendered prior to *Scindia.*

FIFTH CIRCUIT DECISION

Reversed and remanded:
"it is for the district court initially to apply [*Scindia*] standard in assessing the propriety of granting summary judgment". 648 F.2d at 1039.

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 3.

Wild v. Lykes Bros. S. S. Corp., 650 F.2d 722 (5th Cir. 1981)

FACT SUMMARY

Ship repairman fell when he slipped from a ladder on the vessel he said was covered with grease. Rungs were tubular shaped piping devoid of non-skid properties.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Summary Judgment for vessel: Applied *Gay* prior to *Scindia*.

FIFTH CIRCUIT DECISION

Reversed and Remanded:
"for reconsideration of the motion for summary judgment . . . in light of *Scindia* and such other recent developments as may be found pertinent."

(Brown, Politz and Tate, Circuit Judges)
(Per Curiam)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 4.

Lemon v. Bank Lines, Ltd., 656 F.2d 110 (5th Cir. 1981)

FACT SUMMARY

Longshoreman unloading rolls of burlap and bales of jute. He was trying to descend ship's sweat battens to steady unstable stacks of cargo bales, when one of the sweat battens (wooden dividers placed between cargo and hull of ship) broke toppling both Lemon and bales of jute.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Jury: (1) Shipowner negligent in manner of stowing cargo.

(2) Shipowner *not* negligent in providing sweat battens.

Judge: Granted defendant's motions for judgment N. O. V. or in alternative for new trial prior to Scindia, applying restatement standards.

FIFTH CIRCUIT DECISION

Reversed:

(1) Judgment N.O.V. in light of *Scindia: BUT*

(2) Affirmed: grant of new trial limited to question of whether shipowner negligent in stowing cargo. Jury decision in finding no negligence in ship's provision of sweat battens. AFFIRMED.

(Goldberg, Frank M. Johnson and Hatchett, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 5.

Wild v. Lykes Bros. S. S. Corp., 665 F.2d 519 (5th Cir. 1981)

(Summary Calendar)
(Same case as #3 above)

FACT SUMMARY

Same as #3 above.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Same as #3 above.

FIFTH CIRCUIT DECISION

Corrected opinion - result same.

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 6.

Pluyer v. Mitsui O. S. K. Lines, Ltd., 664 F.2d 1234 (5th Cir. 1982)

FACT SUMMARY

Longshoreman using ship's ladder to fasten chains at top of cargo. Ship's ladder had no rubber "snubbers" at bottom to prevent ladder from skidding. As plaintiff descended ladder, it slipped causing him to fall and injure himself. THE CAPTAIN OF THE VESSEL TESTIFIED LADDER WAS UNSAFE.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Ship negligent 60%; plaintiff negligent 40%. New award of $9,895.89. Court applied pre-*Scindia* 5th Circuit standards.

FIFTH CIRCUIT DECISION

Affirmed:"We conclude that *Scindia* did not change the law in this circuit as relates to the situation presented by Pluyer." 664 F.2d at 1247.

(Markey, Chief Judge; Gee and Politz, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

YES

CASE 7.

Cavalier v. T. Smith and Son, Inc., 668 F.2d 861 (5th Cir. 1982) (Summary Calendar)

FACT SUMMARY

Cargo being removed from ship by crane mounted on derrick barge owned and operated by injured longshoreman's employer. Crane operator could not see loads so flagman signaling. Draft of pipes failed to clear hatch coming, causing pipes to slip out of sling and fall into hold on plaintiff.

TRIAL COURT DECISION
(JURY OR JUDGE)

Judge: Held longshoreman's suit barred by Section 905(b) because injury caused by negligence of employees performing stevedore services.

FIFTH CIRCUIT DECISIONS

Affirmed

(Rubin, Johnson, and Garwood).

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 8.

Durr v. Global Marine, Inc., 673 F.2d 740 (5th Cir. 1982)

FACT SUMMARY

Drilling crew member on a fixed platform in Gulf of Mexico assisting in moving equipment from drilling platform to adjoining tender vessel. Crane operator, who was a *seaman*, negligently injured Durr.

TRIAL COURT DECISION:
(JURY OR JUDGE)

Judge: Summary Judgment for ship because drilling crew member injured by seaman performing work of a "stevedore" at time of accident.

FIFTH CIRCUIT DECISION

Affirmed

(Coleman, Politz and Garwood, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 9.

Hill v. Texaco, Inc., 674 F.2d 447 (5th Cir. 1982)

FACT SUMMARY

Contractor hired by Texaco to determine effect of rust on thickness of walls of gasoline storage tank. Tank drained of ballast water only 3 hours before plaintiff descended into tank with ultrasonic testing equipment Plaintiff climbing out of tank on "stiffeners" (shelf like projections from tank wall) when a piece of rust came loose and caused his fall.

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge: Awarded damages to plaintiff, who was found to be guilty of 20% comparative negligence.

FIFTH CIRCUIT DECISION

Reversed:

"Mere presence of the vessel's crew on the ship does not prove knowledge of the hazardous condition." * * * The tank, although wet, posed ONLY A LIMITED AND ACCEPTED HAZARD TO Hill. . ." 674 F.2d at 450, 452.

(Dyer, Sam D. Johnson, Williams, Circuit Judges).

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 10.

Ducote v. International Operating Co. of La., Inc., 678 F.2d 543 (5th Cir. 1982) (Summary Calendar)

FACT SUMMARY

International taking barge owned by Riverway to International's terminal for cleaning. Ducote worked for International. While cleaning cargo pen of barge, Ducote was standing on aluminum ladder unsecured at top and with no rubber feet on bottom. Ladder slipped and he fell. Ducote argued International was owner *pro hac vice* of barge.

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge: Summary Judgment for International (not owner *pro hac vice* of barge though negligent) and Burnside (not negligent though owner of barge).

FIFTH CIRCUIT DECISION

Affirmed

(Gee, Garza and Tate, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 11.

Burks v. American River Transp. Co., 679 F.2d 69 (5th Cir. 1982)

FACT SUMMARY

Longshoreman unloading barge when fiberglass hatch cover gave way causing plaintiff to fall into hold plaintiff claimed he was entitled to sue for unseaworthiness because he was a member of the crew of a barge which was equipped to transfer cargo from barges to ocean going vessels and 33 USC Sec. 902(3) excludes any "member of a crew of any vessel" from LHWCA benefits *ergo* from coverage under Section 905(b) prohibition against longshoremen's suits for unseaworthiness.

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge:

(1) Plaintiff not entitled to sue for unseaworthiness.
(2) No negligence by defendant.

FIFTH CIRCUIT DECISION

Affirmed

Plaintiff did not sue his employer and was not injured on its barge where he was a regular crew member. He was not a member of the crew of barge on which he was hurt, therefore, he could not sue it for unseaworthiness.

(Brown, Wisdom and Randall, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

CASE 12.

Chaisson v. Rogers Terminal and Shipping Corporation, 679 F.2d 410 (5th Cir. 1982)

FACT SUMMARY

Longshoreman's employer's elevator barge, that functioned as intermediary between a grain barge and ocean-going vessel to which it had been fastened, causing several tons of grain to be poured upon plaintiff as he worked in the hold. Employers tug had pulled the barge away from the vessel. Defendant claimed injury was caused by negligence of those 'engaged in providing stevedoring services," thus claim barred under Section 905(b).

TRIAL COURT DECISION: (JURY OR JUDGE)

Jury: Shipowner negligent in its vessel operations as distinguished from stevedoring operations. Plaintiff recovers.

FIFTH CIRCUIT DECISION

Affirmed:

"The jury could reasonably find that the negligent failure to provide a stern winch constitutes dereliction of Rogers' duties as a vessel owner."

(Brown, Gee and Garwood, Circuit Judges)

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

YES

CASE 13.

Stass v. American Commercial Lines, Inc., 683 F.2d 120 (5th Cir. 1982)

FACT SUMMARY

Longshoreman trying to open a defective door on deck of cargo barge. Set of doors behind him had been opened. As plaintiff lifted on defective door he could only lift it 3 feet, then had to drop it. Vibration caused him to step back in slippery substance (probably soybean sprout residue), and fall into open hatch behind him.

TRIAL COURT DECISION: (JURY OR JUDGE)

Judge: Judgment for defendant.

FIFTH CIRCUIT DECISION

Reversed and Remanded:

To apply *Scindia*. "Since it is clear from *Scindia* that a vessel owner is under an obligation to turn its vessel over to the stevedore in a reasonably safe condition and is required to warn the stevedore of any malfunctioning of the vessel's gear or equipment, such as the defective grain door. . . We cannot say with certainty what result the District Court would have reached had it analyzed this case applying the *Scindia* doctrine."

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

UNKNOWN

CASE 14.

Doucet v. Diamond M Drilling Company 683 F.2d 886 (5th Cir. 1982)

FACT SUMMARY

Casing crew pusher injured back while attempting to remove cross threaded pipe thread protector with wrench while one ton joint of casing hanging suspended from sling. Protector should have been removed by drilling company - shipowner's employees on pipe racks. Plaintiff and his co-worker testified the shipowner's driller ignored their request to lift the pipe to a level where the protector might be safely removed with a wrench thus plaintiff had to pull on wrench in a stooped position 2 - 3 feet off floor. The driller testified he remembered nothing about the accident.

TRIAL COURT DECISION: (JURY OR JUDGE)

Jury: Verdict for plaintiff for $600,000 reduced 10% for comparative negligence.

Judge: Denied defendant's motions for directed verdict, Judgment N. O. V., for new trial.

FIFTH CIRCUIT DECISION

Reversed.

(1) "The pipe did not fall on him or strike him. He hurt himself. . ." 683 F.2d at 890.

(2) Reasonable jurors could not infer "that the driller. . . heard the shouted request and simply failed to honor it." 683 F.2d at 894

DID MARITIME WORKER RECOVER FOR NEGLIGENCE

NO

APPENDIX 8

STATISTICAL ANALYSIS OF SECTION 905(b) DECISIONS BY THE FIFTH CIRCUIT

I. *Pre-Scindia*

A.	Total Cases	18
B.	Maritime Worker Finally Denied Recovery	11
C.	Cases Remanded for Trial With Final Result Unknown	4
D.	Trial Court Judgment For Maritime Worker Affirmed	3
E.	Cases Brought to Final Decision	
	1. For Shipowner	78.6%
	2. For Maritime Worker	21.4%

II. *Post-Scindia*

A.	Total Cases	13
B.	Cases Decided Prior to *Scindia* Remanded for Application of *Scindia* With Final Result Unknown	5
C.	Maritime Worker Finally Denied Recovery	6
D.	Affirmed Trial Court Judgment for Maritime Worker	2
E.	Cases Brought to Final Decision	
	1. [illegible]	75%

1. For Shipowner 75%
2. For Maritime Worker 25%

III. Fifth Circuit Decisions Where Maritime Workers Section 905(b) Right to Recovery Finally Decided 22

A. Cases Denying Recovery Against Shipowner 17 (77%)

B. Cases Allowing Maritime Worker's Recovery 5 (23%)

NO. 82-1032

In the Supreme Court of the United States

OCTOBER TERM, 1982

HERMAN J. DOUCET,

Petitioner

VERSUS

DIAMOND M DRILLING COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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ARGUMENT

I. THE MOST RECENT SECTION 905(b) DECISION OF THE FIFTH CIRCUIT EXEMPLIFIES ITS INTRACTABLE RESOLVE TO APPLY THE OUTMODED CONCEPTS OF THE RESTATEMENT OF TORTS (OR CONTRACTS) TO THESE CASES IN DEFIANCE OF THIS COURT'S PRECISE HOLDING IN SCINDIA STEAM NAVIGATION CO. V. DE LOS SANTOS.

The recently reported case of *Moser v. Texas Trailer Corp.*, 694 F.2d 96 (5th Cir. 1982) (Summary Calendar) exemplifies the intractable resolve of the Fifth Circuit to apply the outmoded concepts of the Restatement of Torts (or Contracts!) to Section 905(b) cases in defiance of this Court's precise holding in *Scindia Steam Navigation Co. v. De Los Santos,*[1] where this Court said:

> "it is urged that the District Court properly turned to and applied §§343 and 343A of the Restatement (Second) of Torts. But the legislative history does not refer to the Restatement and also states that *land-based principles of assumption of risk and contributory negligence are not to be applied in §905(b) cases. This strongly suggests, as Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959), indicated, *that maritime negligence actions are not necessarily to be governed by principles applicable in non-maritime contexts. Furthermore, since the lower courts are not only in disagreement as to the applicability of §§343 and 343A* but also to their impact and meaning when applied to the maritime context, *those sections,* while not irrelevant, *do not furnish sure guidance in cases such as this.*

[1] 451 U.S. 156, 168, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), h. 14.

Thus in very restrained language this Court politely told the Fifth Circuit not to use archaic Restatement principles in §905(b) cases. This wise counsel was doubtless motivated by this Court's recognition that a compilation by esteemed law professors of their consensus as to what tort law should be in the 50 states of our Union in 1965 was a poor vehicle for developing negligence standards under a federal maritime law passed in 1972 being applied to cases in the 1980's.

This Court in *Scindia* tacitly recognized that when Congress passed the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, it relegated injured maritime workers to a "negligence" action with a distinct maritime flavor but identical to the injured land based worker's right of action in one important respect—the maritime worker no longer enjoyed the right to sue the shipowner for liability without fault under the doctrine of unseaworthiness. Consequently, the *Scindia* decision precisely delineates those circumstances under which the shipowner would be guilty of §905(b) negligence for *dangerous conditions*, such as the defective ship's winch aboard *Scindia's* vessel, which *conditions* would have been labelled unseaworthiness prior to the 1972 Amendments.

On the other hand, *Scindia* forthrightly says in a manner understandable to even the most obtuse reader that the shipowner's liability for cases of *operational negligence* is different from his liability for unseaworthy conditions, when it says: "*It is accepted that the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equip-*

ment, under the active control of the vessel during the stevedoring operations. 451 U.S. at 167. In thus defining operational negligence this Court avowedly adhered to its well-established definition of general maritime law negligence declared in *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959) where a passenger who fell on a defective stairway recovered for shipowner negligence and this Court "adopted a single duty of '*exercising reasonable care under the circumstances of each case,*' rather than to incorporate in the maritime law the complexities of the common law of invitee and licensee. *Id.* at 632,..."[2] Moreover, "The Kermarec standard was reaffirmed in Marine Terminals v. Burnside Shipping Co., 394 U.S. 404, 22 L.Ed. 371, 89 S.Ct. 1144 (1969), a case involving a suit by the stevedore against the shipowner..." where this Court held "that the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care 'under the circumstances.' "[3]

Simple as the *Scindia* rationale seems, the Fifth Circuit has demonstrated again in *Moser* that it has either totally misinterpreted this Court's position or has decided to thwart this Court's will by covertly reinstating its own pre-*Scindia* Restatement standard of negligence, while rendering ritualistic semantic homage to *Scindia.* In *Moser,* the defendant shipowner Crescent Petroleum Corporation purchased a housing module to be used by its employees as quarters during their work on an oil drilling project in the Persian Gulf. Crescent hired someone else to load the module on a barge chartered by Crescent as owner *pro hac vice.* The loading contractor removed *two 3x6*-foot

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[2] *Scindia Steam Navigation Co. v. De Los Santos, supra,* 451 U.S. at 163, n. 10.

[3] *Id.,* 451 U.S. 163, n. 10; 166.

floor gratings from a second floor grating and did not replace them after the module had been loaded. The plaintiff, an engineer hired by Crescent to help with the construction of its Persian Gulf project, was asked by Crescent to observe the loading of the module and report any damage to the shipowner. While carrying out his duties, he predictably fell through the hole in the walkway and suffered injuries which the trial judge assessed at $511,000. The trial court rendered judgment against the loading contractor (presumably impecunious), the designer of the module and Crescent. In its initial review of the case, the Fifth Circuit reversed the judgment against the module designer and Crescent and remanded the case for a determination of Crescent's liability under §905(b). The Fifth Circuit's pre-*Scindia* opinion was replete with references to the Restatement of Torts standards to be applied and said:

> "Since Moser's claim against Crescent as owner of the module is a maritime negligence action rather than a suit under LHWCA, federal maritime law applies. However, '*general maritime law incorporates the general law of torts when not inconsistent with the law of admiralty.* [Citing 5th Circuit cases but no United States Supreme Court Cases]. Accordingly, *we turn to the general law of torts to determine the duties of an employer of an independent contractor under the circumstances presented in this case.* See *McCormack v. Noble Drilling Corp.*, 608 F.2d 169, 17475 (5th Cir. 1979)." *Moser v. Texas Trailer Corp.*, 623 F.2d 1006, 1014-1015 (5th Cir. 1980).

The Court then found that Crescent owed Moser no duty for the negligence of its contractors because of principles contained in Sections 414 of the *Restatement (Second) of Contracts* (1965) and 412 of the *Restatement Second of Torts (1965).* The *McCormack* case cited by the Court had

specifically relied on Restatement (Second) of Torts §409, §414 to hold that Chevron owed no duty to ensure that its independent contractors performed their work safely in offshore oilfield casing operations. 608 F.2d at 174-175.

An ingenuous observer might have anticipated that the Court's issuance of the *Scindia* decision between the time *Mosher* first came up to the Fifth Circuit in 1980 and the time *Moser returned to the Fifth Circuit in 1982 would, at the minimum, have resulted in a total removal of pre-Scindia* Fifth Circuit Restatement reasoning and precedents from its second *Moser* opinion. However, such an unsophisticated observer should have felt forebodings when the Fifth Circuit declared in *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243, 1247 (5th Cir. 1982) "THAT *SCINDIA* DID NOT CHANGE THE LAW IN THIS CIRCUIT AS RELATED TO THE SITUATION PRESENTED BY *PLUYER*" (i.e. a defective ship's ladder), and that his expectations were naive. The *Doucet*[4] decision upon which this writ is based confirmed the Fifth Circuit's dogged adherence to "assumption of the risk" reasoning *a la* Restatement of Torts. All hope that *Scindia* has affected a change of heart in the Fifth Circuit is totally obliterated by *Moser* where the Court held that Crescent:

> "owed Mr. Moser no duty-absent a *peculiarly unreasonable risk of physical harm**--to discover and remedy hazards created by the contractors. 623 F.2d at 1015. We remanded the case, however, "for a determination of Crescent's

[4] *Doucet v. Diamond M Drilling Company*, 683 F.2d 886 (5th Cir. 1982).

* Emphasis by the writer. Query: if a 3x6 foot hole in a walkway does not create "a peculiarly unreasonable risk of physical harm" to a maritime workman, what does? Perchance a cobra asleep in a hole?

status as owner of the vessel and any attendant duties under 905(b)." Id. at 1016.

On remand the district court assumed rather than finding *that Crescent was the shipowner and that the condition in the* module was a dangerous condition in the vessel itself. Even so, the court held that Crescent breached no duty it owed Mr. Moser since his injury was caused by a transitory condition of which it had no knowledge, created by independent contractors over whom it retained no control. We affirm that holding for the reasons stated in our former opinion. See also *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981); *Guidry v. Continental Oil Co.*, 640 F.2d 523 (5th Cir. 1981), cert. denied, 454 U.S. 818, 102 S.Ct. 96, 70 L.Ed.2d 87 (1981); *Mallard v. Aluminum Co. of Canada, Ltd.*, 634 F.2d 236 (5th Cir. 1981), cert. denied, 454 U.S. 816, 102 S.Ct. 386, 70 L.Ed.2d 85 (1981).

The liability as to third persons provided by 33 U.S.C. §905(b) is one for negligence. Since Scindia, at all events, *it is clear that this liability is no more than, if as, extensive as that subsisting under "the general law of torts."* Under that law, we held on the former opinion that no duty was owed Mr. Moser by Crescent. It follows that none was owed him under §905(b)." 694 F.2d at 97-98.

Given this Court's holding in *Scindia* that the general maritime negligence standard is applicable to cases of operational negligence under §905(b) and the "the general law of torts" as expressed in the Restatement is inapplicable to §905(b) cases, this Court will no doubt be astonished by the heedlessness of the Fifth Circuit's unwarranted conclusion that the §905(b) negligence liability "*is no more than, if as,* extensive as that subsisting under

'the general law of torts.' " Brazen disregard for the controlling decision of this Court is exemplified by the Fifth Circuit's citation as controlling precedent of two of its own pre-*Scindia* decisions. *Guidry v. Continental Oil Co., supra,* involved a situation where the shipowner placed pipe on the floor contrary to normal practice, contributing to an injury to a casing crew worker. The Fifth Circuit held: "If location of some of the tools *afforded some obstacle* to a safe performance of the work, the condition was perfectly apparent to all..." 640 F.2d. at 532. Assumption of the risk as forbidden by *Scindia,* n'est pas?

In *Mallard v. Aluminum Company of Canada, Ltd., supra,* boards provided by the shipowner cracked under the wheel of a forklift which toppled over paralyzing plaintiff from the chest down. Plaintiff had allegedly warned the shipowner the boards were dangerous and voids beneath the boards were 1½ by 2 feet rather than the normal 6 inches. The Fifth Circuit said the injured employee could not recover if his stevedore employer "was in a better position to appreciate fully the hazard and avoid the danger," 634 F.2d at 245, citing as its authority Restatement of Torts (Second) §343A (1965) as explained and applied to §905(b) cases in the Fifth Circuit's then leading case of *Gay v. Ocean Transport & Trading, Ltd.,* 546 F.2d 1233 (5th Cir. 1977).

The message of *Moser* is clear. In the eyes of the Fifth Circuit, the Restatement still lives in §905(b) cases. But *Scindia* will now be cited as authority for application of the convuluted licensee--invitee distinctions and assumption of risk principles of the Restatement of Torts to §905(b), as well as for the application of the torturous distinctions between the shipowner's responsibilities to injured third persons for dangerous conditions created by his

independent contractor's employees rather than by the shipowner's own employees under the Restatement of Contracts. It is a puzzle how the Restatement of Torts, rather than the simple *Kermarec* first semester maritime tort principles of "due care under the circumstances" ever got applied to §905(b) cases; but it is an absolute mystery how the Restatement of Contracts ever got involved in §905(b) decisions.

Only one answer suggests itself from a careful review of the 33 §905(b) cases now decided by the Fifth Circuit (the 32 cases digested in the appendix to Doucet's writ application plus *Moser*). Only blatant acts of gross or admitted negligence bordering on willful intent to injure will justify recovery by a §905(b) litigant in the Fifth Circuit. Of the nine post-*Scindia* cases where a §905(b) worker's rights were finally determined, there were only two workers who recovered: (a) In *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1234 (5th Cir. 1982) the ship's captain admitted the ladder which fell with plaintiff was defective (however, the plaintiff was still held to be 40% contributorily negligent); and (b) In *Chiasson v. Rogers Terminal and Shipping Corporation*, 679 F.2d 410 (5th Cir. 1982) the shipowners employees dumped several tons of grain on plaintiff.

II. THE FIFTH CIRCUIT'S APPROACH INSURES THAT EVERY SECTION 905(b) JUDGMENT ADVERSE TO THE SHIPOWNER WILL BE APPEALED.

The F.E.L.A. was enacted in 1908. 35 Stat. 65. The Jones Act was enacted in 1920. 41 Stat. 1007. Between 1911 and 1956, this Court rendered 125 decisions relating to the sufficiency of evidence in jury verdicts under the

F.E.L.A. alone plus countless decisions dealing with the sufficiency of evidence to support Jones Act verdicts.[5] Then this Court stemmed the tide of jury verdict appeals in Jones Act and F.E.L.A. cases in 1957 by holding in *Rogers v. Missouri Pacific Railroad Co., supra,* 352 U.S. 500, 506: "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death...[I]f that test is met [judges] are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities."

It is a cliche' of maritime practice that appeal of an adverse Jones Act jury verdict is almost always futile and a responsible lawyer advises his client of this fact of life. Thus, most Jones Act cases are settled finally before or after a jury verdict is rendered. However, under current Fifth Circuit jury verdict review practice and with at least three conflicting standards being applied by various federal circuits to determine whether a motion for directed verdict or judgment n.o.v.[6] was improvidently denied, any competent counsel for a losing shipowner must counsel his client to appeal in effect to re-try the facts in the Court of Appeals. Not only does such a situation do mortal violence to the Seventh Amendment to the United States Constitution, it is sure to inundate the already overloaded federal appellate Court system with §905(b) appeals.

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[5] *Rogers v. Missouri P.R.Co.*, 352 U.S. 500, 548, 77 S.Ct. 443, 1 L.Ed.2d 493, 543 (1957) (Justice Frankfurter, dissent).

[6] *Schwimmer v. Sony Corp.*, __ U.S. __, 103 S.CT. Rep. 362, 364 __ L.Ed.2d __ (1982) (Justice White, Dissent from Denial of Writ).

CONCLUSION

On February 6, 1983, Chief Justice Warren Burger told the mid-winter convention of the American Bar Association that with the crushing Supreme Court workload "only fundamental changes...will avoid a breakdown of the system—or of some of the individual judges."[7] In this emergency context it is Kafkaesque for federal courts of appeals to be re-trying the facts of maudane personal injury trials. No fair minded person could read the Fifth Circuit's opinion in Doucet without realizing they re-tried the facts. If a manifest injustice had been done to Diamond M, does it not stand to reason that an able impartial federal district judge who heard all the evidence would *at least* have granted Diamond M's Motion for a new trial—which he denied?

When Hammurabi first posted the written laws of Babylon in the marketplace almost 4,000 years ago, his aim was to inform the citizenry of what the lawwas so that they could know what rules their sovereign required them to obey and what their legal rights were as citizens. In our society only a decision of this Court can perform the function of Hammurabi's Code in clearly informing all §905(b) litigants and *all* the federal circuit courts of Appeal that there is one uniform national standard of operational negligence under §905(b) and one uniform national standard of §905(b) review of jury verdicts which must be uniformly applied by all federal circuit courts.

I. Jackson Burson, Jr.
Counsel for Petitioner

[7] Baton Rouge, *Morning Advocate*, Feb. 7, 1983, p. 1.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the above and foregoing has this day been forwarded to all attorneys of record by depositing same in the United States mail, postage prepaid, and properly addressed to the said attorneys, this 12th day of February, 1983.

I. Jackson Burson, Jr.

NO. 82-1032

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HERMAN J. DOUCET,
Plaintiff-Petitioner,

versus

DIAMOND M DRILLING COMPANY,
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF BY RESPONDENT DIAMOND M DRILLING COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Petitioner's version of the facts is riddled with conjecture, supposition and error. Rather than undertake a time-consuming line-by-line attack, Diamond M adopts the facts as set forth by the Fifth Circuit, as follows:

> "Herman J. Doucet injured his back while working as a pusher for an oil well casing crew on a submersible drilling barge in the Gulf of Mexico, twenty miles off the Louisiana shore. Upon suit brought under 33 U.S.C. §905(b), a jury in the Western District of Louisiana absolved Chevron U.S.A., Inc. of negligence and found that Diamond M Drilling Company was guilty of negligence proximately causing Doucet's injuries. His damages were assessed at $600,000, reduced by ten percent for his contributory fault. Judgment was entered for $540,000 less $65,213.64 awarded American Home Assurance Company as the intervening Diamond M compensation carrier. Diamond M appeals. We reverse.
>
> As operator, Chevron U.S.A., Inc., contracted with Diamond M for the drilling of the oil well, off the coast of Louisiana. Diamond M supplied the submersible drilling barge EPOCH, the drilling crews, and the roustabout crews. Chevron contracted with Offshore Casing Crews, Inc., Doucet's employer, for the oil well casing operations which were to be prosecuted on board the vessel.
>
> April 21, 1977, aboard the EPOCH, Doucet was the foreman (pusher) of the five man

casing crew employed by and working for Offshore, executing the casing contract for Chevron. The casing crew was working in conjunction with the roustabouts employed by the vessel. Doucet had five years experience as a pusher, and had worked on many similar jobs, which usually ran five to ten to twenty-four hours, depending upon weather and other conditions.

Beginning at approximately 11:30 P.M., the casing crew spent an hour and a half getting the casing equipment ready to go. A trolley line was rigged from the drill floor to the pipe rack. At Chevron's direction, Doucet's crew had brought five rubber thread protectors aboard the EPOCH. They were to replace the metal thread protectors originally attached to the end of each pipe joint to protect the threads from damage while being moved about from place to place. The casing crew showed the Diamond M roustabouts how to replace the metal protectors with the rubber ones before sending the pipe along to the platform. As a matter of fact, the casing crew removed the first five metal protectors and put on the rubber ones while the joints lay on the pipe rack. The casing crew then returned to the rig floor and began operations.

When the pipe is taken from the pipe rack and arrives at the point where it is to be set in the drilling hole the rubber protector

is unsnapped and sent back down the trolley to be used on the succeeding joints.

In six to seven years work in casing operations, Doucet was experienced in taking off both metal and rubber pipe thread protectors and had worked with metal protectors on approximately half of the jobs he had been on. The casing pipe joints were hoisted from the pipe rack onto the drilling floor by the draw works which were operated by the driller, a Diamond M employee. Doucet would unsnap the rubber protectors from the joints and guide the joints into the drill hole. After running about an hour of casing (twenty to twenty five lengths), Doucet noticed that a drilling floor worker was unable to remove a metal protector. Intending to remove the metal protector, Doucet picked up a 36 inch pipe wrench and placed it around the protector. Upon applying the wrench Doucet says he realized that the pipe was hanging too low, that is, about 2 ½ feet off the drilling floor (Doucet was only 5 ½ feet tall) so he 'hollered to' the driller, a Diamond M employee, to 'raise the joint a little.' Hand signals are often used in such a situation but Doucet was holding the wrench with both hands and in that position could not give a hand signal. The driller was somewhere between ten and twenty feet away. At trial, the driller did not recall the incident, but testified that such a verbal request if given and heard would have been

complied with as a matter of course. For whatever reason, the joint remained below waist level and Doucet did not repeat his request, he did not wait on a lift, and there is no evidence that he asked for the assistance of a welder to cut off the metal protector with a blow torch. Instead, he energetically jerked on the metal protector six or seven times and then felt a hard pain in his back. This took place around 2 A. M. on April 22, 1977, and that is what this litigation is about.

After the incident, Doucet quit working because of the pain in his back but remained aboard the EPOCH until the job was completed. For eight or ten days afterward he did not go to a doctor. He had had two back injuries prior to this one. Fourteen years previously he had fractured three vertebrae and was unable to work for six weeks. The second injury occurred about 1975 when Doucet pulled a muscle in his back and missed three to four weeks of work. Doctors were of the opinion that because of his back condition Doucet could not permanently return to heavy manual work, such as that of a longshoreman or roughneck. His fourth grade education substantially restricted his possibilities of finding sedentary work. An expert testified that the injuries caused a loss of $561,385.80 in future wages and this testimony was not contradicted."[1/]

1/ *Doucet v. Diamond M Drilling Co.*, 683 F.2d 886, 888-889 (5th Cir. 1982)

Diamond M is constrained to correct one egregious error in petitioner's Statement of Facts. On at least two occasions, petitioner refers to undocumented portions of his own testimony and the testimony of Mr. Emery Richard in support of his statement that Diamond M "*ignored*" his request to "pick up a little" on the pipe. [Pet. for Cert. p. 6] These statements infer that the driller, Mr. Billy Buchans, heard and declined Doucet's request. 2/ There is no evidence in the record to support this statement.

ARGUMENT

I. THE WRIT SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT APPLIED THE STANDARD OF REVIEW REQUIRED BY THE DECISIONS OF THE COURT

Despite the petitioner's claims to the contrary, the decision of the Court of Appeals did not consider an important and undecided question of Federal Law that should be settled by this Court. The Fifth Circuit directly followed the applicable decisions of this Court. Accordingly, the writ cannot be granted under Rule 17 on the basis of an important and unresolved question.

A. The Court of Appeals Applied the Standard of Review for the Motion for Directed Verdict or Judgment Non Obstante Veredicto dictated by this Court.

In overturning the District Court's denial of Diamond M's

2/ WEBSTER'S THIRD NEW INTERNATIONAL COLLEGIATE DICTIONARY (UNABRIDGED) (3rd ed. 1971) defines "ignore" as follows: "to refuse to take notice of: shut the eyes to: disregard.will fully."

motion for directed verdict or judgment n.o.v., the Fifth Circuit applied the standard of review dictated by this Court. Petitioner objects that the standard of review used by the Court of Appeals is inapplicable to cases arising under section 905(b) of the Longshoremen and Harbor Worker's Compensation Act. The court below used the test adopted by the Fifth Circuit in *Boeing Company v. Shipman.* 3/ The late Robert A. Ainsworth, Jr., writing for the Court en banc, described the test as follows:

> "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence - not just that evidence which supports the non-mover's case - in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they

3/ 411 F.2d 365 (5th Cir. 1969)

> be granted only when there is a complete absence of protative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury, as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences and determine the credibility of witnesses". 4/

Petitioner states that since his action "arose under a Federal Statute, . . . the *Boeing* rule should not have been applied to it." [Pet. for Cert. p. 12] Petitioner argues, without citation of authority, "that the language in many decisions of this Court suggests that the standard of review for jury verdicts arising under §905 (b) should restrict the Fifth Circuit from tampering with jury verdicts except in those cases where there are no protative facts to support the verdict. . . ." [Pet. for Cert. p. 12] In lieu of the *Boeing* standard, petitioner invites the application of the standard of review reserved for the Federal Employers' Liability Act 5/ and Jones Act 6/ cases. This standard, as set out in *Lavender v. Kurn* 7/ requires the court to direct verdict or grant judgment notwithstanding the verdict "[o]nly when there is a complete absence of probative facts to support the conclusion reached. . . ." 8/ Even if this Court were to apply this more rigirous standard, there are no probative

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4/ *Id.* at 374-75.

5/ 45 U.S.C. §51, *et seq.* (hereinafter referred to as "FELA").

6/ 46 U.S.C. §688.

7/ 327 U.S. 653 (1946)

8/ *Id.* at 653.

facts to support the jury's conclusion that Diamond M was negligent under the guidelines laid down in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*,9/ The Fifth Circuit, however, appropriately applied the *Boeing* test rather than the *Lavender* test.

The *Lavender* standard for review of motions for directed verdict and judgments notwithstanding the verdict applies only to FELA and Jones Act cases. The *Lavender* test standard reflects the Court's attempt to give force to the congressional intent that FELA cases secure jury determinations in a larger proportion of cases than is true for other cases.10/ "The FELA test is peculiar to that kind of case as a consequence of the statute itself and is accordingly not applicable in non-FELA jury trials." 11/ As the court in *Boeing* pointed out, the FELA test should not be employed as a vehicle to re-establish the "scintilla" rule which has been rejected by the federal judiciary.12/

In contrast to the intent of Congress with respect to FELA and Jones Act cases, the legislative history of the LHWCA demonstrates that the appropriate standard of review is that used in common law cases. In the 1972 amendments to the LHWCA, Congress removed from longshoremen the remedy of unseaworthiness in exchange for significantly increased benefits. In limiting the remedies available to longshoremen, Congress intended to place the longshoremen and the shipowner in the same position as other litigants under the common law, as follows:

9/ 451 U.S. 156 (1981)

10/ *Boeing*, 411 F.2d at 371.

11/ *Id.* at 372.

12/ *Id.* at 372-73.

"The Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessel for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. *This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits. The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he was injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty" or the like.*

* * *

Under this standard, as adopted by the Committee, there will, of course, be dispute as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation - - just as they are in cases involving alleged negligence by land-based third parties. *The Committee intends that on the*

> *one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances."* 13/

In sharp contrast to the announced intent regarding the FELA and Jones Act, Congress felt that the rights of a longshoremen against a vessel should be no greater than any other common law litigant. 14/ Congress did not intend to secure for longshoremen a greater number of jury verdicts in section 905(b) actions. 15/ Thus, the appropriate standard of review is not that employed in FELA and Jones Act cases, but rather the common law standard as set out in *Boeing*.

13/ H. R. Rep. No. 92-1141, 92nd Congress, 2d Session, 3 U.S. Code Cong. & Admin. News, pp. 4699, 4703-4704 (emphasis added).

14/ The only exceptions, made in the interest of uniformity of application, were that comparative rather than contributory negligence should be applied and that assumption of risk would not be a valid defense. *Id.* at 4705.

15/ In applying the LHWCA scheme to oil workers on vessels working on the outer continental shelf, Congress implicitly rejected petitioner's argument that oil workers, because of the hazards of their profession, are entitled to the same treatment as seamen or railway workers. See *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342 (5th Cir. 1980); 99 Cong. Rec. 6963 (1953). This may appear somewhat unfair, but the remedy lies in legislative not judicial actions.

In addition to applying a standard of review consistent with congressional intent, the decision of the Fifth Circuit is consistent with the standard of review set out in *Scindia*, which decision expressly rejects the standard of review suggested by petitioner. After discussing questions related to the shipowner's awareness of defects in a winch, the Honorable Byron R. White stated, as follows:

> "We raise these questions but cannot answer them, since they are for the trial court in the first instance and since neither the trial nor the appellate courts need deal with them unless there is sufficient evidence to submit to the jury either that the shipowner was aware of sufficient facts to conclude that the winch was not in the proper order, or that the winch was defective when cargo operations began and that Scindia was chargeable with knowledge of its condition." 16/

Whereas under *Boeing* there must be conflict in substantial evidence to create a jury question, *Scindia* holds that a section 905(b) case should not go to the jury unless there is adequate evidence the shipowner was aware of sufficient facts to conclude a hazard existed which the vessel owner was chargable with knowledge of an unreasonable hazard existing when the operations commenced. If anything, the *Boeing* standard of review applied by the Fifth Circuit is less restrictive, not more restrictive than the standard for review laid down by this Court in *Scindia*. Accordingly, the Fifth Circuit's standard of review of the motion for directed verdict or judgment n.o.v. was consistent with

16/ 101 S.Ct. at 1627.

the decisions of this Court on this issue and with the legislative history of section 905(b). Thus, the writ should be denied because there is thus no unresolved question of Federal Law for this Court to decide.

B. The Fifth Circuit Properly Applied the Standard of Review

The Court of Appeals correctly applied the standard of review to the facts of this case. The uncontradicted evidence shows that the rubber thread protectors, designed solely to protect the threads on the casing pipes, are only used about half the time to expedite the casing operation. [Tr. 42, 43, 88, 127, 141, 196.] Petitioner's own safety expert, Mr. Paul Montgomery, testified that his preference for rubber thread protectors did not arise from considerations of safety. 17/ Thus, there was no evidence that the failure

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17/ "Q. Now, are there any safety practices or procedures or property procedures which apply to the use of rubber protectors in a casing operation?

A. I like to use quickie protectors. Not from a safety consideration, but for other considerations.

Q. What reasons do you use them?

A. First off, I would like to take the metal protectors off the pipe while it's on the racks and it gives you an opportunity to look at the threads and possibly eliminate a problem that you might have later on while you are actually running the casing. Also, if necessary, you can clean the threads then put the metal protectors back on just hand tight and since you only have a limited supply of quickie protectors, you put them on just before you take the pipe up onto the rig floor to be run. It saves a great deal of time for the casing crew and speeds up the operation in my experience to use quickie protectors." [Tr. 237-38.]

of the roustabouts to replace the metal protector with a rubber protector was negligent.

Petitioner did not adduce substantial evidence at trial that the Diamond M driller in charge of the pipe lift saw petitioner was trying to remove the metal thread protector and neglected to lift the pipe when requested. Petitioner testified that he did not make any hand signals to the driller and requested only once that the driller raise the pipe. [Tr. at 202.] Petitioner testified that he received no response from the driller indicating that he had heard the request. [Tr. 238.] Moreover, the testimony of neither the Diamond M driller nor the other members of the petitioner's crew established that the Diamond M driller was or should have been aware that the pipe should have been raised much less that the hazard of injury was present. As petitioner himself indicated, the only way he could tell whether the metal protector would come off easily was to use the pipe wrench on it. [Tr. 263.]

Application of the *Scindia* standard to the facts of this case shows that no jury issue was created since there was not sufficient evidence that Diamond M was aware of sufficient facts to conclude that an unreasonable hazard existed; or alternatively, that Diamond M was chargeable with the knowledge of an unreasonably hazardous condition that existed at the commencement of the casing operations. The Fifth Circuit, correctly applied *Scindia* and *Boeing* in overturning the District Court's denial of the motion for directed verdict or judgment n.o.v.

II. THE WRIT SHOULD BE DENIED BECAUSE THE DECISION OF THE FIFTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS IN THE SAME OR OTHER CIRCUITS

This Court should deny the writ of certiorari because the Fifth Circuit's decision in this case is not in conflict with its own decisions or with those of other Courts of Appeal. In an attempt to state a reason for the granting of the writ, petitioner has manufactured a spurious conflict among the decisions of the Fifth Circuit and other circuits reviewing jury verdicts under section 905(b). Even the most detailed analysis of the authorities cited by petitioner fails to disclose this conflict.

Petitioner correctly points out that when enumerating the standard for reviewing jury verdicts in section 905(b) cases, the Fifth Circuit has consistently applied the *Boeing* standard. 18/ Petitioner is incorrect, in his characterization of the Honorable John R. Brown's opinion in *Chiasson v. Rogers Terminal and Shipping Corp.* 19/ In that opinion, the former Chief Judge stated, "The record provides support for the jury's finding, which we are neither inclined

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18/ *Samuels v. Empresa Lineas Martimas Argentinas*, 573 F.2d 884 (5th Cir. 1978), cert. denied, 443 U.S. 915 (1979); *Stockstill v. Gypsum Trans.*, 607 F.2d 1112 (5th Cir. 1979), cert. denied, 451 U.S. 969 (1981); *McCormack v. Noble Drilling Co. of California*, 608 F.2d 169 (5th Cir. 1979); *Hebron v. Union Oil Co. of California*, 634 F.2d 245 (5th Cir. 1981); and *Doucet v. Diamond M Drilling Co.*, 683 F.2d 886 (5th Cir. 1982).

19/ 679 F.2d 410 (5th Cir. 1975)

nor permitted to disturb on appeal." 20/ Although he cited two Jones Act cases, 21/ there is no indication that Judge Brown intended to apply a standard more restrictive than *Boeing*. The language in the Jones Act cases to which the judge referred the reader merely states that a jury verdict will be sustained if there are facts from which a jury might infer negligence 22/, a statement consistent with *Boeing*. The Court did not characterize the quality of the evidence when it reviewed the verdict. Indeed, the evidence was substantial: there was direct, rather than inferential, evidence that the defendant had breached its duty to the plaintiff. Thus, it is at best an exaggeration to state that Judge Brown's opinion in *Chiasson* is in conflict with the other decisions in the circuit.

The decisions of the Fifth Circuit do not conflict with those in other jurisdictions. In order to create the illusion of conflict, petitioner has chosen a section 905(b) case 23/ that cites another section 905(b) case 24/ that in turn cites, among others, an FELA case. 25/ Neither of the section 905(b) cases adopt a standard that conflicts with *Boeing*:

20/ *Id.* at 412.

21/ *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523 (1956); *Sanford Bros. Boats Co. v. Vidrine*, 412 F.2d 958 (5th Cir. 1969).

22/ *Schulz*, 350 U.S. at 526; *Sanford*, 412 F.2d at 963.

23/ *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334 (1st Cir. 1980), cert. denied, 499 U.S. 1135 (1981).

24/ *Rios v. Empresas Lineas Maritimas Argentinas*, 575 F.2d 986 (1st Cir. 1978).

25/ *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943).

the Courts only state, in language repeated by the court in *Boeing*, the general principles applicable to review of a motion for judgment n.o.v. and do not address the quality of the evidence on which the jury based its verdict. Moreover, as support for its general statements concerning the standard of review, the Court in *Rios* cited not only an FELA case but several cases involving non-statutory causes of action as well.[26]

Using the technique employed by petitioner, it is just as permissible to conclude that FELA and non-statutory cases share the same standard of review. The mere inclusion of an FELA case in a string citation supporting a general proposition in an LHWCA case is not an indication that the Court intended to adopt a similar standard for section 905(b) cases. Petitioner has cited no other cases to support his claim of conflict among the circuits. Thus, there is no reason to grant the writ of certiorari on the basis of conflicting decisions.

III. THE WRIT SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT DECIDED THE CASE IN A MANNER CONSISTENT WITH THE DECISIONS OF THIS COURT ON THE ISSUES OF ASSUMPTION OF RISK AND THE STANDARD OF NEGLIGENCE

A. The Court of Appeals Did Not Require Petitioner to Assume the Risk of Injury

The Fifth Circuit did not hold that the petitioner assumed the risk of injury. Citing the decision of this Court in *Scindia*, it was stated "The defense of assumption of the risk is un-

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26/ *Rios*, 575 F.2d at 990.

available in §905(b) litigation."27/ In reversing the Trial Court's denial of Diamond M's motion for directed verdict or judgment n.o.v., the Court of Appeals determined not that petitioner assumed the risk of injury, but that there was no sufficient evidence that Diamond M had violated the duty imposed in *Scindia*. Justice White described the duty of the shipowner in this fashion:

> "This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazard on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work".28/

Diamond M's duty under *Scindia* was twofold. First, it requires that the shipowner have its vessel and equip-

27/ *Doucet*, 683 F.2d at 890, n.3.

28/ 394 U.S. at 416, n. 18.

ment 29/ in such condition that an experienced and expert casing worker would be able by the exercise of reasonable care to carry on his work with reasonable safety. Second, Diamond M was required to warn petitioner of hazards that he might encounter in the course of his work that were either not known to him or would not be obvious to him or anticipated by him if he were reasonably competent in the performance of his work. There was no evidence adduced at trial that the failure to replace the metal protector with a rubber protector rendered the equipment defective. The testimony showed that the replacement of the metal protectors with rubber protectors arises from operational rather than safety considerations. [Tr. 196, 327-28.]

Moreover, there was insufficient evidence that Diamond M violated its duty to inform petitioner of hidden risks of which Diamond M had or should have had knowledge. *Scindia* greatly limited the duty of Diamond M to inspect and supervise the operations of the casing crew.

> "[T]he shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedores. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty

29/ As pointed out by petitioner, the rubber thread protectors were not Diamond M's equipment, but ordered by Chevron from Offshore Casing, Inc., petitioner's employer. [Tr. 255.]

to inform himself." 30/

The 1972 amendments to the LHWCA "did not undermine the justifiable expectations of the vessel that the stevedore would perform with reasonable competency and see to the safety of the cargo operations." 31/

The Fifth Circuit correctly decided that there was insufficient evidence that Diamond M breached any duty to the petitioner under this *Scindia* standard. There was no evidence adduced at trial indicating that the Diamond M driller was aware of petitioner's request to raise the pipe. Additionally, there was no evidence to show that the Diamond M driller should have known of the need to raise the pipe. Diamond M and its driller had no general duty by way of inspection to discover any dangerous conditions that developed within the confines of the casing operation. Accordingly, Diamond M is not liable to petitioner for injuries caused by conditions unknown to Diamond M and about which Diamond M had no duty to inform itself.

More importantly, Diamond M was entitled to assume that petitioner would perform his job with reasonable competence and see to his own safety in the performance of the casing operations. 32/ Only petitioner was in a position to appreciate the risk involved in removing the thread protector in this manner. It was a task frequently undertaken with no difficulty whatsoever. If a problem was encountered with its removal, Diamond M was justified in its expectation

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30/ 101 S. Ct. at 1624.

31/ *Id.*

32/ *Id.*

that Mr. Doucet would employ the several other means available to safely accomplish this task. Petitioner testified that the thread protector could have been returned or put aside to permit removal with a wrench or blowtorch. [Tr. 260-61.]

The Court of Appeals did not find that petitioner assumed the risk, but rather that there was no evidence that Diamond M had breached the duties imposed on it by this court in *Scindia*.

B. The Fifth Circuit Applied the Standard of Shipowner's Negligence Consistent With the Decision of This Court

The standard of shipowner negligence used by the Court of Appeals is the same standard adopted by this court in *Scindia*. As noted above, the shipowner fails to meet his duty under *Scindia* if he fails "at least to warn the stevedore of *hidden* danger which would have been known to him in the exercise of reasonable care ....." 33/ It would be inconsistent with the LHWCA to hold that the shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the casing operation.34/

The Fifth Circuit applied this standard and determined that the evidence at trial was insufficient to have supported a conclusion by the jury that Diamond M breached any duty to petitioner. There is no evidence that custom or contract imposed additional burden on Diamond M. The

33/ 451 at U.S. 167, 172.

34/ *See* 451 U.S. at 169.

evidence at trial demonstrates that rubber protectors were used only about half the time. [Tr. 42, 43, 88, 127, 141, 196.] Petitioner has testified that in other operations pipes with cross-threaded metal protectors had been sent to the rig floor and the protector was removed either with a wrench or was cut off. [Tr. 260.] Therefore, custom indicates that merely sending a pipe with a metal protector to the rig floor was not negligent. The standard of negligence applied by the Fifth Circuit is consistent with the *Scindia* decision.

Petitioner's reliance on *Pluyer v. Mitsui OSK Lines* 35/ as an example of the Fifth Circuit's misapplication of *Scindia* is mislaid. The Court in *Pluyer* upheld the jury's verdict in favor of the plaintiff. 36/ The Court merely stated that the previous decisions of the Fifth Circuit did not conflict with *Scindia*. 37/ Petitioner has not shown any respect in which the Fifth Circuit differs from *Scindia*. Even if the Court of Appeals misapplied *Scindia* in the *Pluyer* decision, petitioner has not shown that the Court did likewise in the present case. Possible errors in *Pluyer* and other decisions afford no basis for review of this case. 38/

Petitioner's tabulation of the results of section 905(b) cases decided by the Fifth Circuit before and after this

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35/ 664 F.2d 1243 (5th Cir. 1982)

36/ *Id.* at 1247-48.

37/ *Id.* at 1247.

38/ To the extent that the standard applied in other decisions is relevant, Diamond M invites the Court to examine the Fifth Circuit's analysis of the *Scindia* decision in *Duplantis v. Zigler Shipyards, Inc.*, No. 81-3802, slip. op. at 3 (5th Cir. Nov. 29, 1982).

court's decision in *Scindia* creates no basis for the granting the writ. This case, like any other, turns on its own facts. If statistics were the proper means for deciding cases, petitioner's brief would be unnecessary.

Even accepting petitioner's figures, the statistics do not indicate that the Court of Appeals is applying a restrictive standard of negligence: Of the thirteen post-*Scindia* cases cited by petitioner, seven have been decided in plaintiff's favor or have been remanded to the Trial Court for reconsideration in light of *Scindia*. Petitioner's premature and inconclusive analysis provides no basis for the grant of the writ of certiorari.

CONCLUSION

The decision of the Fifth Circuit did not address an important and unresolved question of Federal Law that this Court should settle. The Fifth Circuit's opinion is consistent with decisions in the same and other circuits. Finally, the Court of Appeals decided this case in a way that conforms with the decisions of this Court. It is not the opinion of the Fifth Circuit that stands naked, it is petitioner who has neglected to clothe his argument with legal authority. Accordingly, the petition for writ of certiorari is without merit and should be dismissed.

Respectfully submitted,

(SIGNED) LLOYD C. MELANCON

Of Counsel:
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CERTIFICATE OF SERVICE

It is hereby certified that 3 copies of the above and foregoing brief were served by depositing such in a mailbox of the United States Postal Service with first-class postage affixed on the envelope addressed, as follows:

I. Jackson Burson, Jr., Esq., of Messrs. Young and Burson, counsel for Mr. Herman J. Doucet, P. O. Box 985, Eunice, Louisiana 70535-0985,

in accordance with the provisions of U.S. Sup. Ct. Rule 28.3, this 13th day of January 1983.

(SIGNED) LLOYD C. MELANCON

NO. 82-1032

In the Supreme Court of the United States

OCTOBER TERM, 1982

HERMAN J. DOUCET,

Petitioner

VERSUS

DIAMOND M DRILLING COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. THE FIFTH CIRCUIT DECIDED THE DOUCET CASE IN A MANNER WHICH CONFLICTS WITH THE DECISION OF THIS COURT ESTABLISHING THE STANDARD OF NEGLIGENCE.

Respondent's brief misinterprets the negligence standards established by this Court in *Scindia Steam Navigation Co. v. De Los Santos.*[1] Respondent dwelt upon those aspects of *Scindia* which established the shipowner's responsibility under §905(b) of the Longshoremen's and Harbor Workers' Act (L.H.W.C.A.)[2] for the defective condition of the ship's gear or equipment used in the stevedore's cargo operations or for dangerous conditions which "develop within the confines of cargo operations that are assigned" totally to the stevedore. 451 U.S. at 172. Unsafe shipboard "conditions" or "defective equipment" created unseaworthiness prior to the 1972 Amendments to L.H.W.C.A.; now it must be determined if they violate the "negligence" standard fashioned by the Court in *Scindia.* To be sure Diamond M violated its *Scindia* duties to remedy defective gear (a cross threaded pipe protector) and a dangerous condition (casing improperly positioned by the driller) both of which were known to the shipowner; as well as its duty to warn Doucet about these dangers.

But what the *Doucet* case is *really about* is the shipowner's responsibility under *Scindia* for the negligent actions or omissions of its own employees in the conduct of a joint offshore oilfield operation where the shipowner's employees had well defined integral roles, a situation not

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[1] 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981).

[2] 33 U.S. 3 § 905(b); hereinafter abbreviated as §905(b).

really presented by *Scindia* stevedore cargo loading operations. *Scindia* held as "accepted that *the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman* or *if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas,* or *from equipment, under the active control of the vessel during the stevedoring operation.*" 451 U.S. at 167. In situations where the vessel's employees are involved in the operations, *Scindia* said, "the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care 'under the circumstances.' "[3]

Doucet's casing company employer (analogous to the stevedore in *Scindia*) did not furnish the casing Doucet was asked to install, or the cross threaded metal protector on the casing he had to try to remove; or the roustabouts whose duty it was to remove the metal protectors before the casing reached the floor, or the driller whose duty it was to position the pipe. The Fifth Circuit flatly contradicted the record when it stated that there was no testimony "...from anybody on the drilling platform...that it had been understood that the roustabouts would remove stuck or "tight" metal protectors before sending them up."[4]

On the contrary, William Green, who was Diamond M's roustabout foreman at the time of the accident, said that when rubber protectors were ordered by the oil well owner, it was the normal duty of the Diamond M roustabouts to remove the metal protectors from each joint of casing on the pipe racks and to put a rubber protector on

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[3] 451 U.S. at 166, citing *Marine Terminals v. Burside Shipping Co.*, 394 U.S. 404, 415, 22 L.Ed.2d 371, 89 S.Ct. 1144 (1969).

[4] *Doucet v. Diamond M Drilling Co.*, 683 F.2d 886, at 890 (5th Cir. 1982).

the casing before it was sent to Doucet on the rig floor (TR. 90-91). Diamond M stipulated that rubber protectors were ordered to be used on the job. (TR. 123). Green testified: "IF YOU LEAVE THE METAL PROTECTORS ON THERE, WHEN YOU DRAG IT UP IT WILL DAMAGE THE THREADS AND IT WILL BIND" (TR. 88). Thus Green's uncontradicted testimony was that failing to replace the metal casing thread protector with a rubber one would forseeably and predictably cause thread damage, thereby making the metal protector unusually difficult to remove. One searches the Fifth Circuit's opinion in vain for any mention of Mr. Green—although his testimony was briefed for the Court. Ignoring testimony that conflicts with one's judicial opinion may be convenient but it is hardly a valid tool of the judicial process. By ignoring Green's uncontradicted testimony and Diamond M's stipulation, the Fifth Circuit "has so far departed from the accepted and usual course of judicial proceeding..." as to justify granting a writ of certiorari. U.S. Sup. Ct. Rule 17(a).

The Fifth Circuit conceded that "the jury could reasonably infer from the evidence that the roustabouts found it either *difficult or impossible* to remove the metal protector, so they simply sent it to the drilling floor where the casing crew would have to deal with it..." 683 F.2d at 890. If the roustabouts found it impossible to remove the metal protector while the 2,000 pound joint of 13 3/8 inch diameter pipe lay still on the pipe racks, could it possibly be "due care under the circumstances" for them to send the pipe up to Doucet when they *knew* he would have to try to remove the protector while the pipe swung suspended from a sling? The roustabouts *knew* the protector could not be removed by ordinary means, but Doucet had no means of knowing before he pulled on the wrench and hurt

his back, as the Court of Appeals admits, 683 F.2d at 891. Under *Scindia*, the roustabouts had a duty to warn Doucet of the problem before he found out about it the hard way. Instead, the Fifth Circuit has held, that *Doucet* had to assume the risks inherent in the Diamond M roustabout's refusal to perform their duties, which flatly defies Scindia's pronouncement that assumption of risk is not a defense to a §905(b) suit.

To make matters worse, the Court of Appeals ignored Robert Owen, a certified safety engineer, who testified that: (1) it was safer for the roustabouts to remove the protector from the casing on the pipe rack instead of making Doucet attempt the task while the casing was suspended from a cable (TR. 317-18), and (2) he had recommended use of the rubber protectors to two casing companies because they would "eliminate the problems they have with removing protectors." (TR. 309).

The Fifth Circuit ignored the testimony of the casing crew workers who said that the rubber protectors made their job less strenuous. For example, Dale Briscoe said when casing came up with a rubber protector on it "...you just unsnap it and it falls right off, *you don't have to fight with the steel protector to take it off.* You don't have to have a wrench to take it off, you just unsnap it and *it comes up easier and it doesn't hang up or nothing.*" (TR. 123). Doucet testified that it was easier to remove a cross threaded protector on the pipe rack, because "on the pipe rack the pipe is steady and on the floor it's hanging on about a thirty (30) foot sling and that sling swings around and you got to manhandle it...[T]he only way to take a protector off when it is stuck you got to jerk on it and every time you would jerk on it the swing would hit the thing." (TR. 197).

The Court of Appeals was captivated by a single sentence uttered by plaintiff's expert petroleum engineer, Paul Montgomery, in which he said he liked to use rubber protectors "not from a safety consideration, but for other considerations." (TR. 327). However, Mr. Montgomery also said "take the metal protectors off the pipe while it's on the racks...*to look at the threads and possibly eliminate a problem that you might have later on while you are actually running the casing...*" (TR. 327-328). The Fifth Circuit also omitted Montgomery's statements that: (1) installation of rubber protectors is "customarily done on the pipe racks,...by roustabouts...who are rolling the pipe into position to be lifted up..." (TR. 329); (2) removal of metal protectors on the pipe rack is done "just to facilitate removing it once you got it onto the floor." (TR. 333); and (3) that metal protectors should be removed" on the pipe rack because you are in a position of *having more people to work on that specific job and generally more time if you have trouble with a specific thread protector.*" (TR. 333).

After omitting most of Montgomery's testimony which supported the jury's finding that Diamond M was negligent, the Fifth Circuit plucked one question and answer by Montgomery out of the three day trial as follows:

> "Q. In this particular case, do you have an opinion as to whether the failure to remove the metal protector on the pipe rack and to replace it with a rubber protector made that casing operation unsafe at that time?"
>
> "A. Yes, I think it should have been removed on the pipe rack. (TR. 337). 683 F.2d at 892.

Despite the testimony of Diamond M's own foreman, Green; of the safety engineer, Robert Owen; of the casing crew members, all cited in brief to the Court, the Fifth Circuit concluded that "This one answer is the sole and only evidence in this record upon which a jury could rely in finding...that sending up the pipe with the metal protector amounted to actionable negligence." 683 F.2d at 892.

The Fifth Circuit was enthralled by the notion that noise on the drilling rig might have prevented the Diamond M driller, Billy Buchan, from hearing Doucet's request to raise the pipe to a proper working position. The Court of Appeals conceded, "The jury had a right to believe Doucet's testimony that he 'hollered' at Buchan to raise the pipe." 683 F.2d at 893. *Query:* who was in a better position to evaluate whether noise on a drilling rig kept Buchan from hearing the request: 6 members of a southwest Louisiana jury who have either worked on or lived in proximity to drilling rigs all their lives and who observed the demeanor of the witnesses or three members of a Fifth Circuit panel who had to rely on one offhand statement by a witness in a cold record that a rig is noisy? Also, if Emery Richard, who was "standing on a platform *five or six feet high located five or six feet from Doucet*", could hear Doucet's request, was the jury not justified in concluding that the driller who was only "five or six feet from Richard" could hear the request? 683 F.2d at 893. More to the point, under *Scindia*, was the jury not justified in concluding that a driller exercising due care "should have heard" the request?

The driller, Buchan, testified that it was his job to pull up on the joint of casing to a position "so that the men won't have to...bend over." (TR. 83). Buchan also said that he "would be looking at him [casing crewman] as it [the

casing] was being guided in to be sure that [he] stopped it at about the right height." (TR. 82-83) The Court of Appeal correctly concluded that: "We must assume that he [Buchan] was paying attention because Doucet testified that Buchan was looking at him at the time. Under *Scindia*, Buchan was obliged to position the pipe at a safe working height whether or not Doucet requested him to do so, because to do otherwise would not be exercising due care under the circumstances.

Joe Hawkes, Diamond M's Safety Supervisor, who is not mentioned in the Fifth Circuit's opinion, affirmed "*if [the driller] sees a piece of pipe coming up in an unsafe position*, he would also be in a position to assume responsibility since his hand is on the throttle *to move it to a safe position...*" Then Hawkes said that the driller's "*job is to watch [the pipe] closely when it's coming in and try to stop it at the position where they normally stop him at.*" (TR. 24)

The driller "failed to exercise due care to avoid exposing" Doucet to "harm from hazards" created by equipment "under the active control of the vessel," which *Scindia* defines as negligence under §905(b). Therefore, the Fifth Circuit's decision is "in conflict with" an applicable decision of this Court and writs should be granted.

II.THERE IS A THREE-WAY CONFLICT AMONG THE FEDERAL CIRCUITS CONCERNING THE EVIDENCE TO BE CONSIDERED IN THE REVIEW OF A JURY VERDICT

Respondent cites Justice White's statement in *Scindia* that appellate courts need not deal with the shipowner's liability "unless there is sufficient evidence to submit to the jury either that the shipowner was aware of

sufficient facts to conclude that the winch was not in the proper order, or that the winch was defective when cargo operations began and that Scindia was chargeable with knowledge of its condition." 451 U.S. 178. However, Justice White found in *Scindia* that there was "a triable issue" as to whether the shipowner was chargeable with knowledge of the defective winch. *Id.* The District Court in *Doucet* held that there was "a triable issue" as to whether Diamond M was chargeable with knowledge of the defective cross threaded protector (through its roustabouts) and of the improper positioning of the pipe (through its driller). When the jury returned a verdict for plaintiff, the District Court denied Diamond M's motion for a new trial, thereby concluding that the jury verdict was not "against the great weight of the evidence." *Cities Service Oil Co. v. Launey,* 503 F.2d 537, 540 (5th Cir. 1968).

In 1982, this Court reaffirmed the deference due factual findings by the District Court in bench trials under Rule 52(a) of the Federal Rules of Civil Procedure. In *Inwood Laboratories v. Ives Laboratories,* __ U.S. __ 102 S.Ct. 2182, 72 L.Ed.2d 606, 618 (1982), this Court reversed the Second Circuit's reversal of the District Court's judgment, saying: "An appellate Court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction, [or] resolve the ambiguities differently,..." This Court stressed that "Determining the weight and credibility of the evidence is a special province of the trier of fact." 72 L.Ed.2d at 616-617.

Pullman-Standard v. Swint, __ U.S. __, 102 S.Ct. 1781, 72 L.Ed.2d 66, 81, (1982) reversed the Fifth Circuit's reversal of a District Court decision, saying that while the Court of Appeals "acknowledged and correctly stated the

controlling standard of Rule 52,...the paragraph in which the court finally concludes"...its decision *"strongly suggests that the outcome was the product of the court's independent consideration of the totality of the circumstances it found in the record."*

We may compare, the Fifth Circuit's *coup de grace* to *Doucet* where the Court concludes by asking:

> "Could reasonable jurors differ over whether substantial evidence supported an inference that the driller had heard the "shouted" request and simply failed to honor it?"
> "On this issue, *we are left with an abiding conviction that they could not.*" 683 F.2d at 894.

Under *Scindia* the jury could find the driller negligent for his failure to properly position the pipe, whether or not he heard the request. It is transparent that the Fifth Circuit made the same "independent consideration of the totality of the circumstances" condemned by this Court in *Pullman.* Would it not be incongruous if this Court allowed the Fifth Circuit to circumvent the *Constitutional* limitations on its appellate review of facts in jury cases contained in the Seventh Amendment, after it prevented the Fifth Circuit from circumventing the *statutory* limitations on appellate review of facts in judge cases contained in Rule 52(a)?

Justice White, author of this Court's opinion in *Scindia,* tersely sums up the existing conflict among the Federal Circuits regarding standards of jury verdict review:

> ..."it is the Second Circuit's practice to examine *all of the evidence* in a manner most favorable to the nonmoving party. This is also the position of at least the Fifth and Seventh Circuits. Boeing Co. v.

Shipman, 411 F.2d 365 (CA5 1969); Panter v. Marshall Field & Co., 646 F.2d 271, 281-282 (CA7 1981). In the Eighth Circuit, however, it appears that only evidence which supports the verdict winner is to be considered. Simpson v. Skelly Oil Co., 371 F.2d 563 (CA8 1967). The First and Third Circuits follow a middle ground: the reviewing court may consider uncontradicted, unimpeached evidence from disinterested witnesses. Layne v. Vinzant, 657 F.2d 468, 472 (CA1 1981); Inventive Music Ltd. v. Cohen, 617 F.2d 29, 33 (CA3 1980). Thus, the federal courts of appeals follow three different approaches to determining whether evidence is sufficient to create a jury issue. See 9 Wright & Miller, Federal Practice & Procedure §2529, at 572. Because the scope of review will often be influential, if not dispositive, of a motion for judgment n.o.v., this disagreement among the federal courts of appeals is of far more than academic interest." *Schwimmer v. Sony Corp.*, __ U.S. __ 103 S.Ct. Rep. 362, 364, __ L.Ed.2d __ (1982). (Dissent).

Professor Wright and Miller say the Fifth Circuit's practice of examining *all of the evidence* "comes dangerously close to weighing the evidence," in violation of the Seventh Amendment. Wright and Miller, *Fed. Practice and Procedure*, §2529, p. 571. Indeed! Judge Frank once said that the Circuit Courts are toward the Supreme Court, "merely a reflector, serving as a judicial moon." *Choate v. Commissioner*, 129 F.2d 684, 686 (2nd Cir. 1942).The judicial moon should provide the same light on §905(b) cases in New York as it does in San Francisco or New Orleans. It will not unless this Court grants this writ and supplies bench, bar, and litigants with a uniform national standard for review of jury verdicts §905(b) cases.

I. Jackson Burson, Jr.
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the above and foregoing has this day been forwarded to all attorneys of record by depositing same in the United States mail, postage prepaid, and properly addressed to the said attorney, this 22nd day of January, 1983.

_____

I. Jackson Burson, Jr.

NO. 82-1032

In the Supreme Court of the United States

OCTOBER TERM, 1982

HERMAN J. DOUCET,

APPELLANT

VS.

DIAMOND M DRILLING COMPANY,

APPELLEE

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR AMICUS CURIAE MISSISSIPPI TRIAL LAWYERS ASSOCIATION

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982 NO. 82-1032

HERMAN J. DOUCET,
APPELLANT

VS.

DIAMOND M DRILLING COMPANY,
APPELLEE

MOTION FOR LEAVE TO FILE BRIEF FOR AMICUS CURIAE MISSISSIPPI TRIAL LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT, HERMAN J. DOUCET

Pursuant to Rule 36.1 of the Rules of this Court, the Mississippi Trial Lawyers Association hereby moves for leave of this court to file this Brief Amicus Curiae in support of the appellant, Herman J. Doucet.

The grounds for this motion are as follows:

1) Appellee, Diamond M Drilling Company, has refused written consent to the filing of this amicus brief. Accordingly, this motion is being filed pursuant to Rule 36.1 of the Rules of this Court.

2) This case involves the question of what standard of review should be applied by a federal court of appeals reviewing the grant or denial of a judgment n.o.v. in a

longshoreman's third-party negligence action against a vessel owner pursuant to 33 U.S.C. §905(b).

3) The Mississippi Trial Lawyers Association is principally composed of attorneys representing plaintiffs, many of whom are personal injury litigants, and many of whom will be affected by the outcome of this case.

4) The Mississippi Trial Lawyers Association believes that litigants in 33 U.S.C. §905(b) actions should receive a uniform standard of review of grants or denials of judgments n.o.v. throughout the circuit courts of appeals, and that this standard should be consistent with the Seventh Amendment of the United States Constitution.

Accordingly, the Mississippi Trial Lawyers Association hereby moves this Court for leave to file the following amicus brief in support of the position of appellant.

Respectfully submitted:

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January ____, 1983

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OCTOBER TERM, 1982 NO. 82-1032

HERMAN J. DOUCET,
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VS.

DIAMOND M DRILLING COMPANY,
APPELLEE

AMICUS CURIAE BRIEF

STATEMENT OF INTEREST OF AMICUS CURIAE

The Mississippi Trial Lawyers Association is a non-profit organization composed of approximately eight hundred members of the Mississippi State Bar Association, practicing within the territorial jurisdiction of the United States Court of Appeals for the Fifth Circuit.

The filing of this brief reflects the concern of *amicus* that two of the stated purposes of the Association, to preserve the adversary system of justice and to protect the right of trial by jury, of those who are damaged in person and in property, will be subverted if this Court does not resolve the conflicting standards of review utilized by various federal courts of appeals reviewing grants and denials of judgments n.o.v. in 33 U.S.C. §905(b) actions.

Amicus has been denied the written consent of

respondent, Diamond M Drilling Company, to file this brief.

SUMMARY OF THE ARGUMENT

Appellant in this action contends that the Fifth Circuit Court of Appeals applied an improper standard of review when it reversed the trial court's denial of judgment n.o.v. in this case. *Amicus* will argue in this brief that this court should provide the federal courts of appeals with a uniform standard of review to be applied to grants or denials of judgments n.o.v. in longshoremen's negligence actions pursuant to 33 U.S.C. §905(b).

ARGUMENT

I. CONFLICTING STANDARDS UTILIZED BY CIRCUIT COURTS OF APPEALS REVIEWING GRANTS OR DENIALS OF JUDGMENTS N.O.V. IN 33 U.S.C. §905(b) NEGLIGENCE ACTIONS OBSTRUCT BOTH CONGRESS' INTENT OF UNIFORMITY IN THE APPLICATION OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND THE UNIFORM APPLICATION OF THE NEGLIGENCE STANDARD PROVIDED BY THIS COURT IN *SCINDIA STEAM NAVIGATION CO., LTD., V. DE LOS SANTOS.*

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901-950 (hereinafter "the Act"), provides in its §905(b) (hereinafter the "§905(b) action") that longshoremen may sue a vessel owner for injury "...caused by the negligence of a vessel". The Congress' primary objective in amending the Act in 1972 with regard to third-party actions against a vessel was to eliminate the

absolute liability of the vessel towards the longshoreman on the basis of "unseaworthiness", a "non-delegable duty" or the like.[1] However, "persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel...."[2] In the leading Supreme Court decision on §905(b) actions, *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), this Court stated that "[the longshoremen's] right to recover from the shipowner for negligence was preserved in §905(b), which provided a *statutory negligence action against the ship* ..."[3] (emphasis added). Therefore, as the Senate Committee on Labor and Public Welfare (hereinafter "the Senate Committee") stated in its Senate Report, "the vessel's liability is to be based on its own negligence...."[4]

Scindia, supra, adopted a standard of negligence to be applied in §905(b) actions.[5] This Court "accepted that the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation."[6] Although this

[1] S. Rep. No. 92-1125 92nd Congress, 2d Session, at 10 (1972) (hereinafter "Senate Rep.") (as noted in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), H. R. Rep. No. 92-1441 92nd Congress, 2d Session (1972) is in all relevant aspects identical to the Senate Report.)

[2] Senate Rep., at 10.

[3] 451 U.S., at 165.

[4] Senate Rep., at 11.

[5] 451 U.S., at 167, 172, 175, 176.

[6] *Id.*, at 167.

statement of the standard of negligence dealt with cargo operations, it should be applicable to all longshore workers within the coverage of the Act, (for example, a casing crew member, such as Doucet) where the vessel "actively involves itself" in the longshore operations and "fails to exercise due care to avoid exposing longshoremen to harm from hazards...."[7] occurring during such operations.

However, *Scindia's* holding, intended to provide a uniform standard of negligence in §905(b) actions, is emasculated when the various federal courts of appeals apply diverse standards of review to the sufficiency of the evidence necessary to establish negligence. Such a haphazard application of varying standards of review to the *Scindia* negligence standard also violates the policy of the Congress in enacting the 1972 Amendments to the Act. The Senate Committee stated its intent "that the negligence remedy authorized in the bill shall [not] be applied differently in different ports depending on the law of the State in which the port may be located."[8] Such legal questions brought under the Act "shall be determined as a matter of federal law."[9] The Congress has thus stated its intent that application of the Act shall be uniform throughout the scope of its coverage.

A. CONFLICTING STANDARDS OF REVIEW ARE UTILIZED BY VARIOUS CIRCUIT COURTS OF APPEALS REVIEWING GRANTS OR DENIALS OF JUDGMENTS N.O.V. IN §905(b) ACTIONS.

At least three different standards of review are

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[7] *Id.*

[8] Senate Rep., at 12.

[9] *Id.*

applied in §905(b) actions by the federal courts of appeals.

Doucet v. Diamond M Drilling Co., 683 F.2d 886 (5th Cir. 1982) is the latest enunciation of the standard of review utilized by the Fifth Circuit in §905(b) actions. The *Doucet* court stated that the rule of *Boeing Company v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc) concerning the appellate "standard of review for the sufficiency of the evidence in such cases" was "firmly established".[10] In the second footnote of its opinion, the *Doucet* Court stated that:

> "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider *all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion...A mere scintilla of evidence is insufficient to present a question for the jury.* The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses (footnote omitted)."[11] (emphasis added).

Ironically, the Fifth Circuit itself appears to apply its own *Boeing* standard of review for §905(b) actions dif-

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[10] 683 F.2d, at 880 quoting *McCormack v. Noble Drilling Corporation*, 608 F.2d 169 (5th Cir. 1979).

[11] *Id.*, at 889 fnt. 2.

ferently on different occasions. Contrary to the above *Doucet* court's reading of *Boeing*, the Fifth Circuit panel in *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981) citing *Boeing*, apparently examined only the evidence supporting the jury's verdict in a §905(b) action, i.e. the evidence in support of the non-movant.[12] *Lemon* reversed the trial court's grant of judgment n.o.v. for the defendant vessel owner. It seems, then, that the Fifth Circuit has rendered conflicting decisions applying its own standard of review, that stated in *Boeing Company v. Shipman, supra.*

The Second Circuit's standard for the review of the sufficiency of the evidence in §905(b) actions is at odds with the Fifth Circuit standard. In *Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163 (2d Cir. 1980) the Court states that:

> "The trial court should grant a judgment n.o.v. only when (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him."[13]

Mattivi, applying the above standard to a §905(b)

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[12] "In this case, the jury found that the defendant shipowner was negligent in the method and manner of stowing the cargo and that the negligence proximately contributed to the plaintiff's injury. *The evidence supporting their verdict [for the non-movant]* included the fact that the chief mate had actual knowledge of the improper loading technique and failed to take actions to either correct the stowage or warn the plaintiff...." (emphasis added). 656 F.2d, at 116.

[13] 618 F.2d, at 168.

action, relies upon Judge Anderson's opinion in *Armstrong v. Commerce Tankers Corp.*, 423 F.2d 957 (2d Cir. 1970), *cert. denied*, 400 U.S. 833, 91 S.Ct. 67, 27 L.Ed.2d 65 (1970).

Armstrong affirmed a judgment n.o.v. in favor of a defendant shipowner and agent in a negligence action brought pursuant to the Jones Act, 46 U.S.C. 688 et seq. (hereinafter "the Jones Act"). Affirming the trial court, Judge Anderson stated that "the evidence must be viewed in the light most favorable to the party other than the movant. The motion [for directed verdict or judgment n.o.v.] will be granted only if (1) there is a complete absence of probative evidence to support a verdict for the non-movant ...' "[14] and that where " 'it is apparent that the jury's finding that some act of negligence was performed by the plaintiff's shipmates was sheer surmise and conjecture' "[15] the verdict of the jury will be set aside. Thus, the *Mattivi* Court, reviewing a §905(b) action, looked to a Jones Act action for the standard of review to be used to determine the sufficiency of the evidence. *Mattivi* applied the stricter standard of review traditionally used in Jones Act actions which requires a "complete absence of probative evidence to support a verdict for the non-movant..."[16] before a jury verdict will be set aside.

Jones Act actions are based on a statutory negligence cause of action,[17] as are §905(b) actions. The *Mattivi* Court, therefore, seems to equate the standard of review

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[14] *Armstrong v. Commerce Tankers Corp., supra*, at 959.

[15] *Id.*, at 960.

[16] *Id.*, at 959.

[17] 46 U.S.C. §688.

for the sufficiency of evidence in §905(b) actions with those of Jones Act actions (both statutory negligence actions).[18] The Fifth Circuit, on the other hand, applies two distinct standards when reviewing the sufficiency of the evidence in §905(b) actions and in Jones Act actions. As previously stated, the Fifth Circuit standard of review in §905(b) cases is "firmly established" by *Boeing Company v. Shipman, supra.* In *Robinson v. Zapata Corp.*, 664 F.2d 45, (5th Cir. 1981), a Jones Act action, the Fifth Circuit states that "the standard to be applied to a Jones Act claim is more stringent. The [trial] court may direct a verdict or grant a judgment n.o.v. on a Jones Act claim only when there is a *complete absence* of probative facts supporting the non-movant's position. (emphasis by the Court) [citations omitted]."[19]

Hence, the stricter standard of review applied by the Second and Fifth Circuits in requiring a "complete absence of probative evidence to support a verdict"[20] before a directed verdict or judgment n.o.v. will be granted in Jones Act actions is also applied to §905(b) actions by the Second Circuit. This is contrary to the Fifth Circuit standard of review for §905(b) actions stated in *Boeing* and *Doucet* which require examination of all of the evidence in the light most favorable to the non-movant and "if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the

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[18] 618 F.2d, at 168. See text at notes 13-16.

[19] 664 F.2d, at 47.

[20] *Id.*, and 423 F.2d, at 959.

case submitted to the jury."[21]

The Second and Fifth Circuits are thus applying inconsistent standards of review in §905(b) actions. The Second Circuit allows a directed verdict or judgment n.o.v. only when there is a "complete absence of probative evidence to support a verdict".[22] In the Fifth Circuit, the standard of reviewing decisions on these motions is that only "if there is substantial evidence opposed to the motion" will such motion be denied.[23] "A mere scintilla of evidence is insufficient to present a question for the jury"[24] in the Fifth Circuit.

That the Second Circuit requires a stricter standard of review in §905(b) cases than does the Fifth Circuit, because the former applies the traditional Jones Act standard to §905(b) actions, is further illustrated by the recent case of *Dabbi v. United Overseas Export Lines, Inc., etc.*, 674 F.2d 175 (2d Cir. 1982). There, the Second Circuit affirmed a judgment n.o.v. for the defendant vessel owner in a §905(b) action where the trial court had ruled that "on the basis of the uncontroverted evidence, [the plaintiff's] version of the accident was a physical impossibility."[25] The Court went on to say that in such a case, "reasonable and fair-minded men could only find for defendant,"[26] citing

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[21] 683 F.2d, at 889 fnt. 2.

[22] *Mattivi v. South African Marine Corp., "Huguenot", supra*, at 167-168 citing *Armstrong v. Commerce Tankers Corp., supra*, at 959.

[23] *Doucet v. Diamond M Drilling Co., supra*, at 889 fnt. 2.

[24] *Id.*

[25] 674 F.2d, at 177.

[26] *Id.*

Mattivi, supra. Thus, when evidence presented by the nonmovant is "physically impossible", it seems that there is a "complete absence of probative evidence to support a verdict" and the Second Circuit will necessarily allow a judgment n.o.v.

At first blush, the standards of review applied by the Second and Fifth Circuits do not appear to be in conflict because of their similar phraseology. The second prong of the *Mattivi* standard of review states that "or (2) [if] there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair-minded men could not arrive at a verdict against him"[27] the directed verdict or judgment n.o.v. will be granted. This is very similar to the Fifth Circuit's requirement of more than a "mere scintilla of evidence" to deny such motions, as a "mere scintilla" would not be enough evidence in the Second Circuit to counterbalance the "overwhelming evidence in favor of the movant...", entitling movant to the directed verdict or judgment n.o.v.

However, the *Mattivi* court stated that "the trial court...correctly concluded that given the *complete absence of substantial evidence supporting the verdict* the jury's finding could only have been the result of sheer surmise and conjecture." (emphasis added).[28] Thus, *Mattivi* utilized only the first alternative of its two-pronged standard of review in a §905(b) action, which is the stricter standard of review used by both the Second and Fifth Circuits in reviewing the evidence in Jones Act actions. Therefore, the use of this standard of review in *Mattivi* implies that had there been evidence to support the verdict, the entry of

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[27] 618 F.2d, at 168.

[28] *Id.*, at 169.

judgment n.o.v. would have been reversed by the Second Circuit. Conflicting standards of review are utilized by the Second and Fifth Circuits, despite some ostensible similarities in the phrasing of the standards.

Finally, the Ninth Circuit offers a third standard of review in §905(b) actions. In *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied* U.S. S.Ct. (Nov. 1, 1982, Docket No. 81-2349), the Ninth Circuit stated: "This court will not disturb a jury's verdict 'unless we find that the evidence was insufficient as a matter of law to support [the] verdict—that the evidence was such that no reasonable man would accept it as adequate to establish the existence of each fact essential to liability.' [quoting from] *Kunz v. Utah Power and Light Co.*, 526 F.2d 500, 504 (9th Cir. 1975)."[29] The Court went on to hold "that the evidence taken together was sufficient to support the jury's verdict for plaintiff, and that the magistrate erred in giving judgment n.o.v. to defendants [vessel owners]."[30] Thus, the Ninth Circuit utilizes a strict standard of review for §905(b) cases in that the evidence must be "such that no reasonable man would accept it" before the Court will allow a jury verdict to be negated, in contrast to the relatively broader standard applied by the Fifth Circuit in *Doucet, supra*, and the apparently stricter standard applied by the Second Circuit in *Mattivi, supra*.

Conflicts between the Circuit Courts as to the stand-

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[29] 651 F.2d, at 1304.

[30] *Id.*, at 1305.

ard of reviewing the sufficiency of the evidence necessary to support a jury's verdict are not limited to §905(b) actions. As evidenced by two very recent cases where certiorari was denied by this Court, this conflict is a significant problem in other areas of law as well. Justice White succinctly explained this in his dissent to the denial of certiorari in two cases decided on the same date, *Mendel Schwimmer d/b/a Supersonic Electronics Co. v. Sony Corporation of America*, 677 F.2d 946 (2d Cir. 1982), *cert. denied*, U.S. S.Ct. (Nov. 8, 1982, Docket No. 82-277) and *Venture Technology, Inc. v. National Fuel Gas Distribution Corporation, et al.*, __ F.2d __ (2d Cir. 1982), *cert. denied* U.S. S.Ct. (Nov. 8, 1982, Docket No. 82-362). Justice White stated: "Thus, the federal courts of appeals follow three different approaches to determining whether evidence is sufficient to create a jury issue. See 9 Wright & Miller, Federal Practice & Procedure §2529, at 572. *Because the scope of review will often be influential, if not dispositive, of a motion for judgment n.o.v., this disagreement among the federal courts of appeals is of far more than academic interest.*" (emphasis added).[31]

B. THE LEGISLATIVE HISTORY OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT SHOWS THAT APPLICATION OF CONFLICTING STANDARDS OF REVIEW BY VARIOUS COURTS OF APPEALS VIOLATES THE CONGRESS' MANDATE.

The 1972 Amendments to the Act were part of a

[31] *Mendel Schwimmer d/b/a Supersonic Electronics Co. v. Sony Corporation of America*, 677 F.2d 946 (2d Cir. 1982), *cert. denied* U.S. S.Ct. (Nov. 8, 1982, Docket No. 82-277) (White, J., dissenting); *Venture Technology, Inc. v. National Fuel Gas Distribution Corporation, et al.*, __ F.2d __ (2d Cir. 1982), *cert. denied* U.S. S.Ct. (Nov. 8, 1982, Docket No. 82-362) (White, J., dissenting).

comprehensive plan "to upgrade the benefits, extend coverage to protect additional workers, provide a specified cause of action for damages against third parties, and to promulgate necessary administrative reforms."[32] The Senate Committee emphasized in its report to the 1972 Amendments that safety to the longshoreman was a prime motivation for the amendments. "It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry...[which includes] a workmen's compensation system which maximizes industry's motivation to bring about such an improvement."[33] The Senate Committee intended and provided that longshoremen "retain the right to recover damages for negligence against the vessel".[34] The Committee went on to say that

> "[p]ermitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition".[35]

Therefore, §905(b), as added to the Act in 1972, was a reaction to "intolerable conditions" in the industry which

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[32] S. Rep. No. 92-1125, 92nd Congress, 2d Session, at 1 (1972). See also fnt. 1, supra, of text.

[33] Senate Rep., at 2.

[34] *Id.*, at 10.

[35] *Id.*

would insure that longshoremen are to "retain the right to recover" for a vessel's negligence which causes them injury. Finally, the Senate Committee stated that: "the negligence remedy authorized in the bill shall [not] be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of federal law".[36]

Thus, because of the nature of the longshoreman's occupation which "remains one of the most hazardous types of occupations..."[37] and the expressed purpose of the Committee to improve "intolerable conditions", this Court endeavored in its landmark decision in *Scindia, supra*, to define what due care is owed to the longshoreman by the vessel. However, even though the question of the due care owed by the vessel is presumably settled by *Scindia*, the application of its principles have been greatly affected by the conflict between the federal courts of appeals as to what standard of review should be utilized in determining whether the evidence adduced proves negligence of the vessel. A reiteration of Justice White's dissent previously quoted from concisely states the significance of this issue: "Because the scope of review will often be influential, if not dispositive, of a motion for judgment n.o.v., this disagreement among the federal courts of appeals is of far more than academic interest".[38]

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[36] *Id.*, at 12.

[37] *Id.*

[38] *Mendel Schwimmer d/b/a Supersonic Electronics Co. v. Sony Corporation of America, supra* and *Venture Technology, Inc. v. National Fuel Gas Distribution Corporation, et al., supra*, at note 31.

It is respectfully submitted that in order to further the policies of Congress in amending the Act, and to establish a uniform application of *Scindia* among the circuits, this Court should resolve the conflict among the federal courts of appeals as to the standard of review in §905(b) actions. A review of the cases previously cited demonstrating the conflict among the federal courts of appeals reveals the varying outcomes of longshoremen's third-party actions against vessels and demonstrates the need for this Court to provide a uniform standard of review in §905(b) actions.

II. THE SEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION MANDATES THAT THIS COURT ESTABLISH A STANDARD OF REVIEW IN §905(b) CASES FOR ALL OF THE CIRCUITS TO FOLLOW.

The Seventh Amendment to the Constitution of the United States provides: "In suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." A judgment n.o.v., although it usually requires a re-examination of the record by a "Court of the United States", is not a violation of the right to trial by jury so as to be made unconstitutional by this amendment. As the *Mattivi* panel noted: "The constitutionality of directed verdicts and judgments n.o.v. is well established. *Galloway v. United States*, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458 (1943), settled the constitutionality of directed verdicts, and *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636 (1935), as supplemented by *Neely v. Martin K. Eby Construction Co.*,

386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967), established the constitutionality of judgment n.o.v."[39]

However, this is not to say that the federal courts of appeals can re-determine facts found by the jury or substitute their own judgment for that of the jury on fact questions. As the *Doucet* court itself reiterated: "However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses (footnote omitted)".[40]

This Court has time and again affirmed that it is for the jury to decide questions of fact and it is for the courts to decide questions of law. Indeed in *Baltimore & Carolina Line, Inc. v. Redman*, Justice Van Devanter stated: "The aim of the [seventh] amendment, as this court has held, is to...retain the common-law distinction between the province of the court and that of the jury, whereby, ... issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court [footnotes omitted]".[41]

In *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962), *re-hearing denied* 369 U.S. 882, 82 S.Ct. 1137, 8 L.Ed.2d 284, *motion denied* 371 U.S. 803, 83 S.Ct. 15, 9 L.Ed.2d 51 (a negligence action by a longshoreman against a vessel owner now established by statute as a "§905(b) action"), this Court affirmatively enunciated that "neither

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[39] 618 F.2d, at 167 n.3.

[40] 683 F.2d, at 890 n.2.

[41] 295 U.S., at 657, 55 S.Ct., at 891.

[the Supreme Court] nor the Court of Appeals can re-determine facts found by the jury any more than the District Court can pre-determine them...",[42] based on the seventh amendment's admonition that "no fact tried by a jury, shall be otherwise re-examined...."

Thus, the seventh amendment "fashions 'the federal policy favoring jury decisions of disputed fact question.' *Byrd v. Blue Ridge Rural Elec. Cooperative*, 356 U.S. 525, 538, 539, 78 S.Ct. 893, 901, 2 L.Ed.2d 953."[43]

Therefore, an appellate court should not substitute its own judgment on questions of fact for that of the jury's judgment where there is any evidence to support a jury's verdict. To do so would require the court to judge credibility and weigh evidence, a function reserved to the jury by the seventh amendment.

This Court should adopt a standard of review applicable to grants or denials of judgments n.o.v. in §905(b) actions requiring the jury's verdict to be upheld whenever there is any evidence to support it. Without such a uniform standard of review, federal courts of appeals utilizing a broader standard of review, such as that applied in *Doucet*, invade the province of the jury reserved to it by the seventh amendment.

CONCLUSION

For the reasons stated, *amicus* respectfully prays that the judgment of the Fifth Circuit Court of Appeals

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[42] 369 U.S., at 358, 359, 82 S.Ct., at 783.

[43] *Id.*, at 360, *Id.*, at 784.

be reversed and that the judgment of the trial court be reinstated.

Respectfully submitted:

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January _____, 1983.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has this date been forwarded to all attorneys of record by depositing the same in the United States Mail, first-class postage prepaid and properly addressed to the said attorneys.

Baton Rouge, Louisiana this_____day of January, 1983.

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NO. 82-1032

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HERMAN J. DOUCET,
Plaintiff-Petitioner,

versus

DIAMOND M DRILLING COMPANY,
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF BY RESPONDENT DIAMOND M DRILLING COMPANY IN OPPOSITION TO AMICUS CURIAE BRIEF OF MISSISSIPPI TRIAL LAWYERS ASSOCIATION

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SUMMARY OF ARGUMENT

The amicus curiae brief of the Mississippi Trial Lawyer's Association, raises no new arguments in support of the petition for a writ of certiorari. Amicus adopts the petitioner's central argument that there is a conflict among the standards used by the Courts of Appeals in reviewing motions for directed verdict or judgment n.o.v. While this issue has been exhaustively briefed by petitioner and respondent, Diamond M Drilling is constrained to correct the amicus's mischaracterization of the standards employed by the Courts of Appeals.

This Court should deny the petition for a writ of certiorari because the Courts of Appeals apply consistent standards of review of motions for directed verdict or judgment n.o.v. The Fifth Circuit's standard of review is consistent with those of the Second and Ninth Circuits. No court will permit a jury verdict to stand in a 33 U.S.C.A. 905(b) case when it is supported only by a scintilla of evidence. The circuits agree that the evidence must be substantial and direct. Evidence that merely permits the jury to speculate or surmise is not substantial evidence and will not support a jury verdict. In evaluating the quality of the evidence, the courts use a "reasonable man" standard. The courts agree that a section 905(b) plaintiff has a heavier land-based burden of proof than does his Jones Act or Federal Employers Liability Act counterpart. The decisions of the Courts of Appeal are not in conflict and the petition should be denied.

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS' DECISIONS REVIEWING MOTIONS FOR DIRECTED VERDICT OR JUDGMENT NON OBSTANTE VEREDICTO

This Court should not grant a writ of certiorari in this case because the standards of review used by the Courts of Appeal in 33 U.S.C.A. 905(b) cases do not conflict. The amicus follows the approach of the petitioner and attempts to secure a writ of certiorari by pointing to an illusory conflict among the standards of review utilized by the Courts of Appeal. No such conflict exists.

The Fifth Circuit's standard of review is consistent with those of the Second and Ninth Circuits. The Fifth Circuit standard, as announced in *Boeing Company v. Shipman*,[1] is that "[a] mere scintilla of evidence is insufficient to present a question for a jury."[2] The other circuits, though their phraseology may differ, apply the same test: no circuit will uphold a verdict in a section 905(b) case supported only by a scintilla of evidence. Neither the amicus nor the petitioner have shown that any of the other circuits have applied a contrary standard of review.

The standard of review applied by the Second Circuit in *Mattivi v. South African Marine*[3] is the same standard used by the Fifth Circuit in *Boeing* and the instant case.

1/ 411 F.2d 365 (5th Cir. 1969).

2/ *Id.* at 374.

3/ 618 F.2d 163 (2d Cir. 1980).

The main thrust of the argument of the amicus is that the Second Circuit, by citing a Jones Act case, has chosen to adopt the stricter Jones Act and FELA standard of review in Section 905(b). However, a reading of *Mattivi* shows that the Jones Act standard of review was not applied in that case. A side-by-side comparison of the language of the *Mattivi* 4/ and *Boeing* 5/ cases shows that the Second and Fifth Circuits are in unison.

MATTIVI	*BOEING*
Thus, when deciding whether to grant a judgment n.o.v., the trial court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury. Rather, after viewing the evidence in a light most favorable to the non-moving party (giving the non-movant the benefit of all reasonable inferences), the trial court should grant a judgment n.o.v. only when (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have	On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence - not just that evidence which supports the non-mover's case - but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On

4/ *Id.* at 167-68.

5/ 411 F.2d at 374.

been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him.

the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury.

More importantly, however, the Fifth Circuit and the Second Circuit apply these tests in the same manner. In *Mattivi*, the court specifically noted that "an LHWCA plaintiff [is] governed by a heavier land-based burden of proof" than is a Jones Act plaintiff. 6/ The Fifth Circuit has consistently imposed this heavier land-based burden on section 905(b) plaintiffs. 7/ In upholding the trial court's grant of a judgment n.o.v., the Second Circuit in *Mattivi* stated, "[t]he trial court looked at the evidence in a light most favorable to Mattivi and correctly concluded that given the complete absence of *substantial* evidence supporting the verdict, the jury's findings could only have been the result of sheer surmise and conjecture." 8/ Similarly, the

6/ 618 F.2d at 168.

7/ *See, Doucet v. Diamond M Drilling Co.*, 683 F.2d 886 (5th Cir. 1982); *McCormack v. Noble Drilling Corporation of California*, 608 F.2d 169 (5th Cir. 1979); *Hebron v. Union Oil Co. of California*, 634 F.2d 245 (5th Cir. 1981); *Stockstill v. Gypsum Trans.*, 607 F.2d 1112 (5th Cir. 1979), *cert. denied*, 451 U.S. 969 (1981); *Samuels v. Empresa Lineas Martimas Argentinas*, 573 F.2d 884 (5th Cir. 1978), *cert. denied*, 443 U.S. 915 (1979).

8/ 618 F.2d at 169.

Fifth Circuit overturned the jury verdict in the present case because "a close examination of the record shows that on this issue the jury was left to rely on speculation and conjecture." 9/ Both circuits, therefore, adopt the position that a jury verdict in a section 905(b) case cannot stand in the absence of substantial evidence to support the jury verdict.

The Second and Fifth Circuits agree on the formulation and application of the standard of review of jury verdicts. Both courts agree that the land-based standard of review is applicable in section 905(b) cases. Both courts refused to let a jury verdict stand if it is supported only by a scintilla of evidence. There is, therefore, no conflict between the Second and Fifth Circuit decisions.

The Ninth Circuit's standard of review is consistent with that of the Second and Fifth Circuits. Amicus cites the Ninth Circuit case of *Turner v. Japan Lines*, 10/ which stated that the court will not override a jury verdict "unless we find that the evidence was insufficient as a matter of law to support [the] verdict - - that the evidence was such that no reasonable men would accept it as adequate to establish the existence of each fact essential to liability." 11/ Amicus contends that this language establishes a standard of review completely different from the other circuits. Both the Second and Fifth Circuit, however, use a "reasonable man"

9/ *Doucet v. Diamond M Drilling*, 683 F.2d 886, 893 (5th Cir. 1982).

10/ 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, ____ U.S. ____, 74 L.Ed.2d 278, 103 S.Ct. 294 (1982).

11/ *Id.* at 1304.

standard in passing on motions for directed verdict and judgment n.o.v. The court in *Mattivi* stated that a motion will be granted if "the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair minded men in the exercise of impartial judgment could not arrive at a verdict against it." 12/ Similarly, the Fifth Circuit in *Boeing* stated "[I]f there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the case should be submitted to the jury." 13/

In *Turner*, the court overturned a judgment n.o.v. not on the basis of a scintilla of evidence supporting plaintiff's case, but on the basis of substantial, direct evidence. Plaintiff offered testimony of experts to establish the safety practices of the industry. Plaintiff also produced evidence that the ship's crew supervised the unloading and the storage of the cargo was obviously and unreasonably dangerous. 14/ The direct evidence provided a firm basis for the jury's verdict; it did not require the jury to "speculate" as to the ship's negligence. The Ninth Circuit standard has the same effect as the Second and Fifth Circuit standards: a mere scintilla of evidence, that is, evidence that merely permits the jury to speculate or surmise, is insufficient to support a jury verdict. The standards of review of all three circuits are consistent. There is no "unmistakable" conflict in Second, Fifth

12/ 618 F.2d at 168.

13/ 411 F.2d at 374.

14/ 651 F.2d at 1304-05.

and Ninth Circuits' scope of review. 15/

A conflict among the circuits does not exist merely because the courts nave used different words to describe the standard of review. As Professors Wright and Miller point out after their examination of the Second Circuit's standard, "Although, as has been indicated, courts have used other phrases than the one preferred here to describe the standard of sufficiency of evidence, it is unlikely that there is any real difference in result." 16/

However the courts may describe the standard, they all agree on its meaning and its application. Neither amicus nor petitioner have shown that the courts look to different evidence in evaluating a jury's verdict in a 905(b) action. Rather, the courts uniformily take all of the evidence in without reweighing, view it in the light and with the inferences most favorable to the party opposing the motion. 17/

15/ In the two antitrust cases cited by amicus, *Mendel Schwimmer d/b/a Supersonic Electronics Co. v. Sony Corporation of America*, 677 F.2d 946 (2d Cir. 1982), *cert. denied*, ___ U.S. ___ (Nov. 8, 1982, Docket No. 82-277); and *Venture Technology, Inc. v. National Fuel Gas Distribution Corporation*, ___ F.2d ___ (2d Cir. 1982), *cert. denied*, ___ U.S. ___ (Nov. 8, 1982, Docket No. 82-362), Justice White dissented from the denial of a writ of certiorari because the conflict between the circuits was "unmistakable." 51 U.S.L.W. 3362, n. 1 (1982).

16/ 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 547 (1971).

17/ See, e.g., *Doucet*, 683 F.2d at 889, n.2; *Mattivi*, 619 F.2d at 167; *Johnson v. A/S IVARANS REDERI*, 613 F.2d 334, 351 (1st Cir. 1980), *cert. denied*, 499 U.S. 1135 (1981).

When this evidence amounts to nothing more than a scintilla, the courts will set aside the jury's verdict.[18] The Courts of Appeals apply consistent standards of review.

CONCLUSION

The decision of the Fifth Circuit did not address an important and unresolved question of Federal Law that this Court should settle. The Fifth Circuit's opinion is consistent with decisions in the same and other circuits. Finally, the Court of Appeals decided this case in a way that conforms with the decisions of this Court. It is not the opinion of the Fifth Circuit that stands naked, it is petitioner who has neglected to clothe his argument with legal authority. Accordingly, the petition for writ of certiorari is without merit and should be dismissed.

Respectfully submitted,

(SIGNED) LLOYD C. MELANCON

Of Counsel:
Messrs. McLoughlin, Barranger,
Provosty and Melancon

18/ See Text Accompanying 8, 9 and 14 Supra.

CERTIFICATE OF SERVICE

It is hereby certified that 3 copies of the above and foregoing brief were served by depositing such in a mailbox of the United States Postal Service with first-class postage affixed on the envelopes addressed, as follows:

I. Jackson Burson, Jr., Esq., of Messrs. Young and Burson, counsel for Mr. Herman J. Doucet, P. O. Box 985, Eunice, Louisiana 70536-0985; and,

James A. George, Esq., of Messrs. George and George, counsel for Mississippi Trial Lawyers Association, 8110 Summa Drive, Baton Rouge, Louisiana 70809,

In accordance with the provisions of U.S. Sup. Ct. Rule 28.3, this 14th day of February 1983.

(SIGNED) LLOYD C. MELANCON

APPENDIX

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December 22, 1982

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Attention Mr. Gary Koederitz

Re: Doucet v. Diamond M.
Supreme Court No. 82-1032. Our LM0537.

Please accept this as a confirmation of today's telephone discussions between Mr. Koederitz and the writer wherein on the limited information presently available to us, respondent Diamond M Drilling Company indicated it does not

favor an amicus curiae brief being now filed by the Mississippi Trial Lawyers Association, supporting the petition for writ of certiorari by Mr. Herman J. Doucet, in accordance with the provisions of the Supreme Court Rules, Rule 36, in the captioned Docket.

Simply stated, the petition involves the adjudication of a typical Louisiana offshore third-party LHWCA 905(b) personal injury claim advanced by an independent contractor's employee against Diamond M, tried in the District Court and reversed by the Fifth Circuit. In that litigation, no outside interest whatsoever was manifested by anyone through the denial by the latter of a petition for rehearing and en banc review, so that we are at a loss to fully understand your unusual concern manifested at this late date.

Perhaps if you could please elaborate and furnish us with the details of your interest, we would be better able to intelligently advise our client thereon and make a recommendation. Objectively speaking and at this point of time with what we know about the inquiry, it is indeed unthinkable that your firm might even have a position one way or the other as to the outcome or decision on Mr. Burson's routine type petition. In this connection the copiously and lengthy curriculum vitae of Mr. George published throughout the area would tend to suggest that the interest of your client might better be served in other more significant pro-plaintiff litigation. In any event, yours is the only request thereon and we have not been solicited on this subject by any defense organization.

With all good wishes for Christmas and the New Year, we remain

Very truly yours,

/s/ Lloyd C. Melancon

Lloyd C. Melancon

LCM/ls